

BEFORE THE

COPYRIGHT ARBITRATION ROYALTY PANEL

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DISTRIBUTION OF 1990,

1991 AND 1992

CABLE ROYALTY FUNDS

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Docket No.

94-3-CARP-CD90-92

Hearing Room 414, Fourth Floor
 Madison Building
 Library of Congress
 101 Independence Avenue, S.E.
 Washington D.C.

Monday, December 11, 1995

The above-entitled matter came on for hearing,
 pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE MEL R. JIGANTI, Chairperson

THE HONORABLE JOHN B. FARMAKIDES

THE HONORABLE RONALD WERTHEIM

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Trygve Myhren				
By Mr. Gersch	1127		1247	
By Mr. Lane		1150		
By Mr. Hester		1199		
By Ms. Hand		1227		
James Mooney				
By Mr. Gersch	1252			
By Mr. Lane		1301		

E X H I B I T S

<u>Exhibit No.</u>	<u>Description</u>	<u>Marked</u>	<u>Received</u>
<u>Program Suppliers</u>			
16-X	New England Colony Cable Systems	1157	1196
17-X	Flagship Station	1164	
18-X	Factbook	1166	1198
19-X	New York Colony Cable System	1172	1198
20-X	New York Colony Cable System	1177	1199
21-X	Ad from CableVision 05-04-95	1320	1352
22-X	Ad from CableVision 03-25-91	1322	1352
23-X	NCTA Cable Television Development	1325	1352
24-X	Regional Sports Network Guide March 1992	1341	1352
<u>National Association of Broadcasters</u>			
1990-92 2-X	NAB Exhibit 12	1230	1246
1990-92 3-X	Transcript from 1980 Hearing	1233	1246

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P-R-O-C-E-E-D-I-N-G-S

(9:37 a.m.)

CHAIRPERSON JIGANTI: Preliminarily, we have something that we were discussing, and there is something we would like. We view this as a cooperative effort from the beginning between arbitrators and the counsel there, and we ask your cooperation on this.

We take your briefs, now whether it is each party individually, whether you cooperate in groups or you cooperate all in one brief, it makes no difference to us.

Here is what we are interested in. We are interested in the brief on the law. The law in the sense of what power does this panel have.

Obviously it comes from 801 and 802 and proceeding from there and it proceeds on to the -- we go from power and we get into what should be persuasive with this panel, and that gets into legislative history, which I have for 1976.

I don't have anything further. We received some things over the weekend, maybe there is more there, and prior rulings of the Tribunal, but specifically, what we do not want when you consider these things, is we do not want anything concerning

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1 the variances between Bortz and Nielsen.

2 That is not what we are comfortable with
3 or what we need any sort of direction or guidance on.
4 We would like to know your views of the law.

5 Furthermore, we would like you to comment
6 on a sentence from the 1989 Tribunal decision, and
7 that sentence is contained at page 15-288.

8 It is in this second column, the first
9 full paragraph. It is the last sentence. The
10 sentence reads as follows: "Should the Tribunal
11 continue the basis upon which it has made its
12 distribution or should it adopt a new basis."

13 I don't mean to strike terror into your
14 hearts because you have presented all of your
15 testimony here, but we are not certain what that
16 means, and we would like to have your comments on
17 that.

18 Thirdly, we would also like to have your
19 comments concerning that portion of the opinion which
20 is the rationale that leads up to the distribution.

21 It is contained at -- well it starts --
22 typically Program Suppliers, as an example -- is at
23 page 15-302 and it says "Program Suppliers," and it is
24 under the heading
25 of -- you can find the heading on it, but the import

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1 of what we have to say is that they make a conclusion
2 there in both paragraphs, and they have a rationale
3 there.

4 We would like your comments, if you have
5 any comments on the rationale used by the Tribunal at
6 that time.

7 Those are my comments. I hope you can
8 comply with our request. The timing for the reply --
9 well, we would like to have it before we break here at
10 the middle of next week so we could have it to think
11 about as we go home over the holidays, or I go home,
12 other parties leave for their holidays also.

13 ARBITRATOR WERTHEIM: If I could amplify
14 or add something, I am particularly interested in the
15 parties' views that distinguish between what we must
16 do and what we may do.

17 There is a section or provision in, I
18 believe it is section 882, it says, "Decisions are to
19 be made on the basis of a variety of things."

20 That doesn't say whether that is to be
21 binding or whether it is persuasive, whether you are
22 just supposed to take those things into account or
23 what.

24 Furthermore, with regard to the '89 final
25 determination, and being perhaps a little more candid

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1 than our chairperson has just been, frankly reading
2 that decision -- the first time I read it, it went on
3 and on and on for many pages, summarizing this party
4 argues this, that party argues that, and then when we
5 got to the final decision about where the Tribunal is
6 coming down, the reasons seems extremely concise, let
7 me say.

8 I don't know whether the parties' feel
9 that that is the sort of reasoning they are looking
10 for from this panel or whether you think something a
11 little more elaborate is called for, but if so, I
12 appreciate you being as specific as you can be as to
13 what that should be.

14 It is not, in my view, very satisfactory
15 for anyone. It seems the court of appeals kind of
16 threw up its hands and said, "Well, we just couldn't
17 do much better than to say, 'Well, we have got this,
18 and we have got that, so let's, out of somewhere, pick
19 a number in between.'"

20 Although the court of appeals, for the
21 most part, swallowed that, it seems like the parties
22 think that Congress expects anything different from
23 this panel.

24 CHAIRPERSON JIGANTI: We wanted to start
25 our discussion basically with you at this stage rather

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1 than wait for proposed findings of fact much later in
2 the proceedings.

3 Are there any questions that you have
4 right now? I don't know that we will sit in the form
5 of being a deposition, and we will answer
6 interrogatories, but if you have some sort of general
7 questions for us, we will be glad to entertain them,
8 or if you want to do it a little bit later, after you
9 have adjusted this.

10 I spoke to the court reporter earlier in
11 the proceedings today, anticipating this, and the
12 court reporter said that you can listen to this
13 portion of the transcript before he gives it to
14 somebody who comes in at noon today to pick up the
15 tape, and it wouldn't be available until tomorrow.

16 That is for your benefit. Not hearing any
17 responses to it, we will proceed, and we will hear
18 about it later if need be.

19 One thing I would like to comment on is
20 the admission of exhibits, and we have got a little
21 bit of a problem I guess.

22 All exhibits are admissible if there is a
23 sponsor. Basically, I think under the rules -- and I
24 have required you to say, "We ask for this to be
25 admitted."

1 Particularly on cross. The reason is that
2 I am not certain at that stage that we go through the
3 procedure that you could go through exhibits when you
4 are presenting your direct case, that is, somebody is
5 allowed to question the witness to see if they are
6 really a proper sponsor, and then it leaves the record
7 somewhat ambiguous. That is what prompted me to do
8 something like that, to require you to specifically
9 offer it, but that is our problem.

10 I think, is there a basis for the exhibit,
11 and if there is a sponsor, if there is a sponsor for
12 the exhibits I don't think anyone even has to make an
13 exclusion in order to exclude it from the record.

14 As we go along I don't know quite how to
15 handle that, but let's make sure that we have a
16 sponsor, and then we will proceed with it from there.

17 Ready to proceed this morning? Mr.
18 Gersch, your first witness.

19 MR. GERSCH: Yes. Joint sports claimants
20 call Mr. Trygve Myhren.

21 CHAIRPERSON JIGANTI: Mr. Myhren, will you
22 take this seat over here. Thank you very much.

23 THE WITNESS: All set.

24 CHAIRPERSON JIGANTI: Okay.

25 Whereupon,

TRYGVE MYHREN

was called as a witness, having been first duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GERSCH:

Q Would you please state your name, sir.

A Trygve Myhren.

Q Mr. Myhren, how are you currently
employed?

A I am the President and Director of the
Providence Journal Company.

Q Okay. You have held that position since
approximately 1990. Is that right?

A Since 1990.

Q And in that time the Providence Journal
has owned a number of television properties. Is that
correct?

A We own 11 television stations, one ABC,
one CBS, five NBC stations, a couple of Fox stations,
and a couple of stations that are affiliated with the
new United Paramount network.

Q These are all broadcast stations?

A They are all broadcast television
stations. The largest one is in Seattle, the second
largest one is in Portland, Oregon, those are both NBC

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1 affiliates.

2 We have a NBC affiliate in Charlotte,
3 North Carolina, an ABC in Louisville, and so on,
4 across the country, and in fact, even in Honolulu.

5 Q With respect to the NBC affiliates. You
6 say you own five affiliates.

7 A The five NBC affiliations make us the
8 second largest group owner affiliated with NBC. So we
9 are a substantial factor in the broadcast business.

10 Q All right. Until very, very recently the
11 Providence Journal also owned a number of cable
12 systems. Is that correct?

13 A We owned approximately 800,000 cable
14 subscribers, also across the country. On October 5th
15 we concluded a sale of those subscribers to
16 Continental Cablevision, which when it closed, made
17 them the third largest multiple system operator.

18 We were the 15th largest. We sold to
19 Continental and they became the third largest.

20 Q When you say October the 5th --

21 A October the 5th of this year.

22 Q So just two months ago.

23 A Yes. We just closed that sale. Right.

24 Q Does the Providence Journal have interests
25 in cable networks?

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1 A We do. Beginning in 1990, when I came
2 with the company, we began to develop video
3 programming. We now are the general partner and
4 manage and partly own a network called the Television
5 Food Network, which is distributed to a little over 15
6 million households now.

7 It has actually been in existence -- after
8 the planning stage -- it has actually been in
9 existence for a little over two years. We are in
10 front of 15 million households, doing about a .4
11 rating.

12 We also are about to introduce in the
13 northwest, on December 18th, a 24 hour news channel
14 for cable, for just the northwestern part of the
15 country, which is the product, really, of our four
16 broadcast stations there.

17 In addition to that we have affiliations
18 with the Mayo Clinic and the New England Journal of
19 Medicine for something called America's Health
20 Network, which will debut on cable at the end of
21 March, of '96.

22 Q Let's go to the period 1990 through 1992.
23 What involvement did you have with respect to the
24 cable systems owned by the Providence Journal in that
25 time period?

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1 A Obviously, in my position I did not
2 directly manage the cable systems, because we are a
3 multi-media company, but I obviously was very aware of
4 what was going on in those cable systems because I
5 have a long cable background.

6 When decisions that had to do with public
7 policy or programming or marketing or major capital
8 expenditures, for example, came up, obviously I would
9 review them and generally held discussions with regard
10 to how the cable systems were doing and what they were
11 doing with the people in cable operation.

12 Q You made reference to your long cable
13 background. How were you employed prior to becoming
14 president of the Providence Journal?

15 A For a brief period of time I had a company
16 called Myhren Media, my last name, in Denver,
17 Colorado, in which I consulted to a lot of cable
18 companies.

19 I also consulted to CBS, for example. I
20 also consulted to some telephone companies and others,
21 but primarily to companies that were in the cable
22 business, and actually bought some cable systems of my
23 own, which I still own down in southern Arizona.

24 Prior to that, in the period from 1975 to
25 the end of 1988, I was with a company called American

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1 Television and Communications, which was initially a
2 public company, and then became a private company when
3 it was bought by Time, Incorporated, and then became
4 a public company again in 1986 when we took it back
5 out to the public, but still then majority owned by
6 Time, Incorporated.

7 That company is today Time Warner Cable.
8 I was the CEO chairman of that company from 1981
9 through 1988. That company, by the way, at the time
10 that I left had about 4-1/2 million cable subscribers.
11 Today that company is the second largest multiple
12 system operator in the business.

13 Q Before you became chairman and CEO of ATC,
14 did you hold another position there?

15 A Before chairman I was actually president
16 and COO, and before that I was executive vice
17 president, and before that senior vice president, and
18 originally a vice president.

19 My concentration, when I came into the
20 company as a vice president, was marketing and
21 programming. I then added other functions, but I
22 would say that the core of my expertise as I went
23 through those years at American Television and
24 Communications, had to do with the marketing and
25 programming areas.

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1 Q Now, will you have any responsibilities
2 with respect to Continental, the company that bought
3 the Providence Journal's cable properties?

4 A I am currently a director of Continental
5 Cablevision.

6 Q Have you had a role with respect to the
7 National Cable Television Association? The trade
8 association for the industry?

9 A About the time that I became chairman CEO
10 at American Television and Communications, I became a
11 -- I went on the board of the National Cable
12 Television Association, and I was on that board into
13 1989.

14 So it was '81 into '89. Interestingly
15 enough, later, when I left ATC, I became a small
16 operator member of the National Cable Board, but
17 during those earlier years I was at one point
18 treasurer, at another point secretary, at another
19 point vice chairman, and eventually chairman of the
20 National Cable Board in 1986 and 1987.

21 Q One thing I may have neglected to ask you
22 about ATC, during the period you were there at ATC,
23 where did it rank among MSOs in the United States?

24 A Various first and second during that
25 period in terms of size.

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1 Q Sure. What is CTAM?

2 A It is the Cable Television Administration
3 and Marketing Society. It is the primary organization
4 in cable dealing with issues such as defining customer
5 needs, the research, looking at program viewership,
6 looking at marketing, looking at customer service.

7 It is the customer oriented part of the
8 cable business.

9 Q And you are one of the founders of CTAM?

10 A I was one of the three founders of CTAM
11 and was later on its president and have maintained a
12 relationship with CTAM over the years.

13 Q Why was there a need for an organization
14 like CTAM?

15 A In the cable business originally --
16 certainly when I entered it in early 1975 and prior to
17 that period -- the business had been built by people
18 who were entrepreneurs, whose background really was in
19 many cases, electrical engineering, electronics.

20 Many of them had been trained in the armed
21 service, and had come out and run electronic stores,
22 tried to sell television sets.

23 It was not easy to do in some rural
24 communities where there wasn't much television.

25 They came up with this idea of

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1 transporting the signals from the bigger cities and
2 creating cable television. You had those people.

3 You had the people who financed them. You
4 had construction people. These were the kinds of
5 people who peopled the cable television business and
6 created the little companies that eventually began to
7 grow.

8 There wasn't much thought beyond, "Gee,
9 people would like some television signals." There
10 wasn't thought about how important it was to have
11 those signals be reliable and clear, and more
12 importantly just what the fare on cable was, how good
13 the programming was or wasn't, how appealing it was,
14 how good your service was or wasn't. Did you answer
15 the telephone? Did you do those kinds of things.

16 When I came into the business, a couple of
17 other people and I looked at it and said, "Wow, we
18 have got a long way to go. We better introduce this
19 concept of customer service, and we better worry about
20 what kind of programming we have and whether people
21 are really interested in that."

22 Q Mr. Myhren, you are the recipient of a
23 number of awards, and I just want to ask you about a
24 couple of them. In 1988 you were the recipient of the
25 Vanguard Leadership Award. Is that right?

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1 A Yes.

2 Q And that awards the person who exemplifies
3 the most outstanding leadership qualities in the
4 industry that year?

5 A As defined by the National Cable
6 Association. Right.

7 Q You have also won the CTAM Grand TAM
8 Award. Is that right?

9 A That is correct.

10 Q And that is also an award for the person
11 who has had the most impact on the industry?

12 A Yes. I think in my case, those awards
13 were made in two different time periods during my
14 career, but I think they were both pretty much for the
15 same things.

16 One was a concentration on customers,
17 customer service, and the other one was for the fact
18 that I had had some impact in the work leading up to
19 the 1984 Cable Act, which was the act that deregulated
20 the cable industry.

21 Q Mr. Myhren, in addition to your positions
22 over the Providence channel, you have served on the
23 public board of the Turner Broadcasting System. Is
24 that right?

25 A Correct.

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1 Q You have also served as a director of HBO?

2 A That position is an internal directorship
3 at Time, Inc., now Time Warner.

4 Q And you served on the board of the Video
5 Jukebox network. Is that right?

6 A This is true.

7 Q And I understand that in September of this
8 year CableVision Magazine named you one of the 20
9 people who has had the greatest impact on the cable
10 industry. Is that right?

11 A That is correct.

12 ARBITRATOR WERTHEIM: What magazine was
13 that?

14 MR. GERSCH: CableVision.

15 BY MR. GERSCH:

16 Q In addition to your cable television
17 positions, Mr. Myhren, you have had involvement with
18 sports. Is that right?

19 A I have. I have been -- I have always
20 loved sports, like many of us, but the, I guess on the
21 organizational or commercial side of sports, the two
22 recent things that might be of interest here, one is
23 I was on something called the Colorado Baseball
24 Commission and was eventually appointed by the
25 governor to put the ownership group together for the

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1 Colorado Rockies, which is something we all feel
2 pretty good about right now.

3 In any event, I also was the chairman last
4 year of the NCAA final four hockey, which was in
5 Providence, Rhode Island, which is where I am now
6 living.

7 MR. GERSCH: At this time, panel members
8 and Mr. Chairman, we tender Mr. Myhren for any voir
9 dire.

10 CHAIRPERSON JIGANTI: Questions? No
11 questions? Very good. You may proceed, Mr. Gersch.

12 BY MR. GERSCH:

13 Q Mr. Myhren, what is the purpose of your
14 testimony here today?

15 A I think I have been asked to try to
16 discuss my understanding of the way cable operators
17 choose programming and why, and what is of valuable to
18 them and what is less valuable.

19 Q Are you familiar with Bortz and Company?

20 A Yes. I am.

21 Q Who are they?

22 A Well, Paul Bortz and his people do
23 consulting, and a fair amount of research in the media
24 businesses. They are highly regarded by people in the
25 broadcast television business, and the cable business,

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1 and I think the entertainment businesses in general,
2 I would say.

3 Q Do you understand that Bortz and Company
4 did a survey for the joint sports claimants
5 represented here?

6 A I am aware of that.

7 Q And what is your understanding of the
8 kinds of results that Bortz and Company received?

9 A Well, at least as I glanced at it, what
10 they did was to do research with cable operators as to
11 how they value the programming that is available on
12 distant signals.

13 They tried to categorize that programming,
14 sports, movies, syndicated programming, PBS offerings,
15 et cetera.

16 As I remember it, they felt that cable
17 operators in that context -- in the distant signal
18 context -- feel that the most valuable piece of
19 programming to them or the type of programming, is
20 sports.

21 The second most valuable is movies. The
22 third most valuable I think, syndicated, and so on.

23 Q And were those results consistent with
24 your experience in the cable business in the 1990 -
25 1992 period?

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1 A Absolutely.

2 Q Let's turn to page 3 of your written
3 testimony where you discuss what it is about
4 programming which generates value to the cable
5 operator.

6 I would ask you if you could explain your
7 opinion on that subject to the panel.

8 A Well, I think you have to understand, to
9 understand how the cable operator thinks about this,
10 how the cable business is structured economically,
11 because that is obviously at the core of what the
12 operator is thinking.

13 The cable business is a business where you
14 have to get people to subscribe and pay money
15 regularly or you are out of business.

16 If you get some advertising revenues as a
17 cable operator, that is nice, but interestingly, it is
18 only about 5 percent of your revenues. The rest of
19 your revenues come from other things, which are
20 primarily subscriptions.

21 It is a very different business from the
22 broadcast business. Broadcast television, which we
23 are also in, where 100 percent of your revenues come
24 from advertising, and none come from subscriptions.

25 They are just very different businesses,

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1 and so you are driven, as a cable operator, to look at
2 your programming and the way that you appeal to
3 subscribers.

4 If you want to have a broad subscription
5 base in a way that appeals to every part of the
6 population, the way that you do that is you have a lot
7 of channels and you put different things on different
8 channels.

9 I always tend to think of it this way:
10 what I want to do is to have programming -- by the
11 time you get done with my channel line up -- which has
12 something for everybody.

13 It has got to have enough of each
14 something so that I don't just whet the appetite so
15 that they subscribe and then later drop off.

16 I have got to do more than whet the
17 appetite. I have got to have enough so that I satisfy
18 them in that regard.

19 That is the key, and frankly, that is at
20 the core of the reason why you get very deeply into
21 how types of programming differ from each other.

22 Q How does sports fit under that criteria
23 that you just described in terms of how cable
24 operators value programming?

25 A Sports is very different from, for

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1 example, if you look at the super station model or the
2 distant signal model, where you have sports, and you
3 have syndicated, and you have movies, and you have
4 these various other types of programming, because
5 sports is perishable, and the others are not.

6 The way that you build a successful movie
7 studio is by having libraries of programming which
8 keeps playing and playing, and you keep getting
9 revenues from it.

10 When the Cubs played the Cardinals, it is
11 over. It is a one time showing. That tends to
12 translate itself into a situation where, from the
13 viewer standpoint, the person that I, as a cable
14 operator, am trying to get to subscribe, I can appeal
15 to people by saying, "If you have this channel which
16 is on cable, you are going to get certain of these
17 games, and if you don't get them, they are gone."
18 That can't be said about any of the other type of
19 programming.

20 I mean, if you are going to have movies,
21 which I think are very valuable programming, to
22 everyone, including the cable operator, but movies can
23 be gotten in the movie theater, and they can be gotten
24 in the video store, and they will have previously, by
25 the time they get to a superstation they will

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1 previously have been shown on broadcast television,
2 and they probably have been shown in pay television,
3 on a cable system, but on a different tier of
4 programming.

5 They have been exposed and exposed and
6 exposed. That is real good for a movies studio who is
7 able to take money out at each stage as they run their
8 windows, they call their windows.

9 The sports people are in a different
10 situation. I am not so, frankly, as interested in the
11 seller perspective, I am interested in the buyer
12 perspective, which is, what does that do for the
13 viewer?

14 Well, for the viewer, the viewer doesn't
15 get another chance at that sports stuff. So, for
16 those people, not everyone in the world is interested
17 in sports, but for those people who are, and there are
18 a large number of people who are, first the idea of
19 missing is a stimulant to their purchase behavior,
20 missing something, and second, the idea of being able
21 to get it is important to them.

22 So we find that, and I have always felt,
23 that sports is enormously important, particularly in
24 this distant signal configuration, because there are
25 a lots of other movies available other places on

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1 cable.

2 There is lots of other syndicated
3 programming, and frankly, there is some other sports
4 on cable, in the basic cable package, but the sports
5 that are here, you can only get here, and once they
6 are shown, they are gone. That is the perishable
7 nature. That plays an enormous role.

8 Q Do the Providence Journal cable properties
9 carry sports on distant signals during the 1990-1992
10 time period?

11 A Sure.

12 Q What kinds of sports?

13 A Oh, we, I mean, on various of our cable
14 systems we had WTBS, WGN, WOR, WPIX, for example, our
15 New England cable systems, depending upon which
16 system, we had any and all of those.

17 It is interesting, in New England, just
18 like there is anywhere in the country, there are a lot
19 of Cub fans, people who have moved from the midwest,
20 people who enjoy the National League, might have been
21 a Mets fan in New York, and knew the Cubs. So WGN,
22 interestingly enough, is even important in New
23 England.

24 There is also the fact that WPIX, for
25 example, out of New York, there are a lot of Yankee

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1 fans in New England, so getting WPIX from New York up
2 there is very important.

3 There is also WSBK out of Boston, which
4 isn't a distant signal in the Boston market, but
5 mostly outside of the Boston market, but not always,
6 is a distant signal.

7 That is very important to New Englanders,
8 many of whom are obviously Red Sox fans but don't live
9 in the Boston market.

10 There aren't a lot of teams in New
11 England. There is one major league team. So this is
12 a very effective product there.

13 I have my own cable systems in southern
14 Arizona, we had WTBS and WGN, we considered them
15 enormously important.

16 Q So you had Cub fans out in Arizona?

17 A Listen, a lot of people from Chicago just
18 in that area of the midwest, tend to retire out there.

19 Q You mention that there are other sources
20 of movies on the cable line ups that cable systems
21 carry. What are some of those other sources of movie
22 programming that the Providence Journal properties
23 might have carried in the 1990-1992 time period?

24 A There are American Movie Classics, which
25 is really all movies. TNT, which is Turner Network

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1 Television, which has lots of movies, also has some
2 sports. USA Network, a lot of movies and syndicated
3 shows, also has a little bit of sports.

4 Q You said in your prepared testimony that
5 as a cable operator, if you could have the people
6 watch the movies on something other than distant
7 signal, that would be in your view advantageous, and
8 you get the distant signal so you can get the sports.
9 Why is that?

10 A Well, facetiously I tend to think about
11 this thing, if I can take the distant signal down and
12 just leave the sports on, and get rid of the
13 syndicated portion and the movie portion, that would
14 open up the opportunity to advertise, which, I don't
15 know if this has been described during the proceedings
16 so far, but one of the things about a distant signal,
17 as a cable operator you cannot place your own
18 advertising on it.

19 You have got to take the whole block as it
20 comes, but that is a bit of a facetious comment. The
21 fact is from an economic standpoint, I will go back to
22 the core economics here, which is what drives the
23 cable operator, I would rather have people buy HBO or
24 Showtime or Movie Channel or Cinemax or one of the pay
25 television offerings to watch their movies than watch

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1 it on basic cable, if I had my druthers.

2 So that is why I said that in testimony,
3 that the sports offering is critical to me there, but
4 frankly, if I had my choice I would rather have the
5 movies and the syndicated -- well, the syndicated
6 stuff I don't think would sell on a pay television
7 offering -- but move the movies up to the pay
8 television offering.

9 Q Let's go to page 5 of your testimony where
10 you are talking about the relationship between Nielsen
11 ratings and value.

12 Let me ask you this question: Do you
13 believe that royalties should be distributed in this
14 proceeding based on Nielsen type viewing data?

15 A I don't think the Nielsen ratings make any
16 -- let me say first, cable operators don't pay any
17 attention to Nielsen ratings.

18 Let's start right there. They don't
19 really have anything to do with the way the operator
20 believes they have got to gain subscribers and keep
21 them, which I said at the outset, is what the
22 economics of the cable business is all about.

23 The key to gaining subscribers and keeping
24 them is to make sure that that subscriber, as I said,
25 has something on there or some things that are

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1 enormously appealing to them, and that you have got
2 enough of that.

3 I will tell you now that if we didn't have
4 any movies or syndicated product or PBS product or
5 whatever, if we didn't have those things on cable, we
6 would already have enough.

7 In other words, we would have enough to
8 appeal to the group that want those things, and we
9 would have enough depth so that we wouldn't just whet
10 their appetite. They would be well taken care of.

11 The same thing really can't be said about
12 sports. I mean, the fact is that because sports is
13 perishable, once again, because that game only takes
14 place once, you can't say that because you have some
15 other sports over here, that satisfies the appetite,
16 it just doesn't.

17 I mean, because that particular
18 Cardinals/Cubs game, or whichever one we want to
19 choose, you know, the Orlando Magic and the Bulls,
20 that game just plain doesn't happen over on that other
21 sports if it is on the distant signal sports.

22 That really is the distinction. I don't
23 know if I am being clear here, but to us, as we buy
24 cable programming, that is just a critical
25 distinction.

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1 Q Is it your experience that with respect to
2 the various -- I will withdraw the question.

3 When you say that to you cable operators,
4 that the Nielsen ratings wouldn't be very important to
5 you, is that your experience on the Providence Journal
6 on both the broadcast side and the cable properties?

7 A I am not making a general condemnation of
8 Nielsen because in the broadcast business, I must tell
9 you that we wake up in the morning looking at the
10 Nielsens, and we go to bed thinking about them because
11 it is a very -- as I said, the broadcast business is
12 different.

13 One hundred percent of your revenues are
14 advertising revenues, and the advertisers look at
15 viewership in determining where they are going to
16 place their advertising, and the Nielsens are -- there
17 are various tools to figure that out, but the Nielsens
18 are a very important tool in that realm.

19 So we consider that very seriously. That
20 is not the issue in cable. It may be for a particular
21 cable programmer who is selling advertising within
22 that programming, but it isn't to the operator.

23 What the operator is concerned about is
24 making sure that each group among the consumers, each
25 potential viewer group has the programming that they

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1 want to watch, and enough of it. It is a very
2 different mind set.

3 Q So you are saying that it is the case that
4 it wouldn't matter to an operator necessarily, that if
5 a sports program had a lower Nielsen rating than a
6 non-sports program.

7 A I could certainly see a situation in which
8 somebody would say to me, "Gee whiz, USA has a 1.0
9 rating on a 24 hour basis, and ESPN has a 28."

10 I am not saying that is exactly what they
11 are right now, but that is right in the ballpark,
12 these things vary as you go along, but I could see a
13 situation like that, and they would say, "And by the
14 way, we are going to charge you exactly the same for
15 USA and ESPN, and USA has this higher rating."

16 I would say, "No. I think I will take
17 ESPN," because what is on USA is much more available
18 elsewhere, what is on ESPN, isn't. Consequently, as
19 a cable operator, I am going to take ESPN. To me,
20 that is the guts of the argument, that it is certainly
21 the way I see it when I sit down and look at cable
22 programming, and the way that other operators look at
23 cable programming.

24 Q Thank you, Mr. Myhren, we have no further
25 questions at this time.

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1 CHAIRPERSON JIGANTI: Okay, who would like
2 to cross examine first?

3 MR. LANE: I will, Mr. Chairman.

4 CHAIRPERSON JIGANTI: Okay.

5 MR. LANE: For the record, I am Dennis
6 Lane, here on behalf of Program Suppliers.

7 CROSS-EXAMINATION

8 BY MR. LANE:

9 Q Mr. Myhren, when you came in you were
10 talking about the food network. Do you recall that?

11 A Yes.

12 Q And did I hear you correctly mention that
13 they have 15 million subscribers?

14 A Yes. I did mention the Food Network, and
15 I did say that there are approximately 15 million
16 subscribing households.

17 Q Did I also hear you correctly to say that
18 they have a .4 rating?

19 A Right.

20 Q What is that?

21 A That is a Nielsen rating.

22 Q That is a Nielsen rating. Mr. Myhren, do
23 you have an ownership interest in the Rockies?

24 A No. I do not. I wish I did.

25 Q Could you tell us what the Colorado

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1 Baseball Commission was or is? Are you still on it?

2 A No. I am not still on it. The Colorado
3 Baseball Commission was put together in the '80s. Its
4 job was to figure out how to get a major league team
5 to Colorado, and we finally figured out what the rules
6 were with the major leagues and we eventually decided
7 that we had to get a sales tax initiative passed,
8 which would guarantee the revenues, which would build
9 a real good, open air, grass, 50,000 seat stadium.

10 So that became our first task. We did
11 complete that successfully, and then, as I said, my
12 further activities came about because the governor
13 took a look at what we had done and asked me if I
14 would get together with two other people and put the
15 ownership group together, which we did.

16 Q Would you turn to page 3 of your
17 testimony, please.

18 A Sure.

19 Q In the first full paragraph on that page,
20 that begins, "I believe -- ," do you see that?

21 A Yes.

22 Q In the second sentence you said, "If it
23 could have been arranged -- " do you have any reason
24 why it could not have been arranged?

25 A I think the reason -- it is Dennis, right?

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1 Q Yes.

2 A Dennis, the reason that we didn't think we
3 could arrange it was that distant signals are sold as
4 a package, and it seems that is all tied together with
5 the copyright rules and the rules on transporting
6 signals.

7 So you couldn't really do that. You
8 couldn't say, "I just want this," from that package.

9 Q Further down on that page, under roman
10 IIIA, you say, "the programming line up for a cable
11 system." Do you mean all the channels that a cable
12 system carries?

13 A I don't see what you mean.

14 Q The first sentence.

15 A Yes. That is what I mean.

16 Q So that includes basic tiers, pay tiers,
17 pay per view, whatever else you carry?

18 A No.

19 Q No?

20 A No.

21 Q Okay.

22 A It really is the basic, and to the extent
23 that there is a tier that is not much more expensive
24 than the basic, then it includes that as well.

25 It emphatically does not include pay

1 television. In other words, you want to appeal here
2 to the broadest range of people you can, that is the
3 most individual groups within what you consider to be
4 a relatively affordable level of programming.

5 Q Now, we have heard the term, "expanded
6 basic," from prior witnesses. Are you including that
7 when you say "basic?"

8 A Yes. I am.

9 Q I take it you try to fill this demand by
10 offering a wide variety of channels?

11 A Exactly.

12 Q On page 4 of your testimony, in the first
13 paragraph, it is actually the carry-over paragraph --

14 A You mean the one that comes from the other
15 page?

16 Q Yes, sir.

17 A Yes.

18 Q You refer to, "alternative sources of
19 sports on cable."

20 A Yes.

21 Q Do you see that?

22 A Right.

23 Q Can you tell us what those are or what
24 they were in 1990 to 1992?

25 A Well, they really can be anything from a

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1 local high school game, which maybe the cable operator
2 is putting on, to the sports that might be on a USA
3 network, or a TNT.

4 Q Is ESPN an alternative?

5 A ESPN, absolutely.

6 Q What about regional sports networks, would
7 they be an alternative?

8 A No, because usually those are in the pay
9 category. We have made this distinction between pay
10 television and basic and tiered.

11 Q TNT is one?

12 A TNT is an alternative sports, it is
13 additional sports. It is interesting. I think the
14 word "alternative" here is probably not a particularly
15 good choice of word on my part because it leads you
16 away from the basic problem that the cable operator
17 talks about.

18 With a movie or a piece of syndicated
19 product, you probably have had lots of chances to see
20 that someplace else. I mean, that precise piece of
21 product you have had a chance to see somewhere else as
22 a consumer or a viewer.

23 With the sports that are on the distant
24 signals, there really isn't an alternative. As I say,
25 if you didn't see that particular game, on that

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1 distant signal, there isn't another place to see it.
2 It is gone.

3 ARBITRATOR WERTHEIM: Are you referring
4 here to something more than WTBS and WGN as distant
5 signals?

6 THE WITNESS: Yes.

7 ARBITRATOR WERTHEIM: What else are you
8 referring to?

9 THE WITNESS: Well, WOR, I think it is
10 called WWOR. WPIX. There are -- I think in the
11 distant signal context there must be 1,400 television
12 stations in the United States. About half of those,
13 in some way or another, are used in the distant signal
14 context, but the vast majority of the sports are shown
15 on just a few of these, you know, the things that are
16 -- the GNs and the TBSs and WORs that are called
17 superstations, and a few others.

18 ARBITRATOR WERTHEIM: Thank you.

19 CHAIRPERSON JIGANTI: What would high
20 school basketball be carried on?

21 THE WITNESS: Well, the cable operator has
22 channels, like a local access channel. They have
23 government access channels. These are channels often
24 that were mandated in the municipal franchises.

25 Locally a cable operator will have cameras

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1 and a studio and people they can call on to produce
2 shows, and they may well do some high school games,
3 some local high school games on that channel.

4 If there is a college in there, they may
5 do those local games. In some cases they may even do
6 Little League games.

7 CHAIRPERSON JIGANTI: Would independent
8 broadcast channels have any of those games?

9 THE WITNESS: No. No. It would be
10 unlikely that an independent broadcaster -- well, it
11 depends on the size of the media market.

12 Take the town that I now have in
13 Providence, the University of Rhode Island or
14 Providence College might well be on a network
15 affiliate at some point, produced locally as their
16 local programming or it might be on an independent
17 broadcast station in Rhode Island, but we are talking
18 about here things that are on a smaller scale, because
19 you don't typically have a cable operator who owns an
20 entire metropolitan market, certainly in the 1990,
21 1991, 1992 time frame, cable is just a scattered
22 business, everything is just municipal franchise
23 boundaries.

24 So you may have 20 or 80 municipal
25 franchises within one media market. So I am talking

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1 about high school games and small college games that
2 would never rise to the importance that would put them
3 on a broadcast station which covers the entire media
4 market.

5 MR. LANE: Mr. Chairman, at this time I
6 would like to show the witness, and introduce into
7 evidence a --

8 ARBITRATOR WERTHEIM: What do you mean
9 when you say you are introducing it? Are you offering
10 it into evidence or do you just want to ask the
11 witness some questions about it?

12 MR. LANE: I would like to introduce it.
13 Since counsel hasn't had a chance yet to object to it,
14 I am giving him that opportunity.

15 It is a five page document. Mr. Myhren,
16 I would ask you, are these the --

17 ARBITRATOR WERTHEIM: Excuse me, how is it
18 marked?

19 MR. LANE: Exhibit 16-X, sir.

20 (Whereupon, the document
21 referred to was marked for
22 identification as Program
23 Supplier's Exhibit No. 16-X.)

24 ARBITRATOR WERTHEIM: Because it is not
25 marked on our copies. I am sorry.

1 MR. GERSCH: Let me just say that I do
2 object to it until it has been shown that the witness
3 can sponsor it.

4 BY MR. LANE:

5 Q Mr. Myhren, are these the New England
6 cable systems that were owned and operated by Colony
7 in 1990 to 1992?

8 A Well, let's see. I am trying to figure
9 out here, we had New Bedford, Massachusetts as well,
10 which I don't see here, but that may well be subsumed
11 --

12 Q It is the third page, sir.

13 A Oh, okay. There it is. Good. Okay.
14 Yes.

15 Q And Colony is the cable system owned by
16 Providence Journal?

17 A Right. Providence Journal owned King,
18 Video Cable, Colony Cable Vision, Colony Cable, these
19 systems here, which are all in New England were all
20 part of Colony Cable.

21 Q Which was owned by Providence Journal?

22 A Which was owned by Providence Journal.
23 Correct.

24 Q Are these the New England cable systems to
25 which you referred on page 4 of your testimony?

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1 A Correct.

2 Q Now, Mr. Myhren, have you ever heard of
3 Cable Data Corporation or Tom Larson?

4 A It doesn't jump to my mind.

5 Q Well, he collects data or the company
6 collects data from the statements of account, and this
7 page, I will represent to you, is a summary of the
8 information.

9 If we go across the columns at the top,
10 you see the accounting period, the monthly rate, the
11 number of subscribers, gross receipts, the royalty
12 paid, and then a list of the call signs for each of
13 the stations that were carried by the system.

14 I just ask you to look through this and
15 perhaps just looking at the subscribers and the
16 monthly rate and the call signs, does this comport
17 with what you understand to be the carriage on those
18 systems?

19 A This is going to take a little while.

20 Q Sure. Take all of the time that you want.

21 A Now, he is just listing, across the top,
22 distant signals?

23 Q No. If it has an "L" in the column, that
24 is local. If it has a "D" that is distant, and if it
25 has an asterisk, it wasn't carried in that particular

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1 period.

2 A He is then just listing broadcast
3 stations, but no other product?

4 Q Exactly. Exactly.

5 A Okay.

6 CHAIRPERSON JIGANTI: It is like an exam.

7 MR. LANE: Do you want to take a break?

8 CHAIRPERSON JIGANTI: No.

9 ARBITRATOR WERTHEIM: Mr. Lane, I am not
10 sure I caught what you are representing the column on
11 the right to be. Is that the monthly rate for
12 subscribers?

13 MR. LANE: Yes, that they record on the
14 statements of account.

15 THE WITNESS: Did you want me to opine on
16 the rates and the subscribers and the royalties?

17 BY MR. LANE:

18 Q No.

19 A Just on the carriage?

20 Q Does this look like --

21 A The only thing I am surprised by here is
22 that there is not WGN.

23 Q That was going to be my first question to
24 you, sir.

25 A Okay. That is the only thing that seems

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1 to be amiss, and I would have to go back and check
2 that. Clearly, we were using, as I said, WTBS, WSBK,
3 WPIX for the Yankees, and so on, but I am not seeing
4 any GN here.

5 Q And you mentioned a number of times this
6 morning that the fans in New England wanted to see
7 Cubs games, but according to these records none of
8 your systems carry WGN.

9 A If these records are correct, Dennis, what
10 that says is that although we got them the Yankees
11 games, and we are getting them the Red Sox games, and
12 so on, we are not getting them the Cubs other than in
13 the context of WTBS.

14 Q On page 4 of your testimony you refer to
15 carriage of WWOR, do you not?

16 A Let me see. Page 4. I do.

17 Q If I look on the Massachusetts systems,
18 WWOR is in the far right hand column. Is it not?

19 A It is.

20 Q It appears, does it not, that as of the
21 beginning of 1988, you dropped WWOR from carriage?

22 A Yes. We did. We had it up until '88 and
23 then took it off.

24 Q Then if we look at the Rhode Island
25 systems, you never carried it on the Pawtucket system,

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1 did you?

2 A No, but we carried it on Westerly.

3 Q You carried it on Westerly.

4 A Correct.

5 Q Now, looking at WSBK for your systems, it
6 is about the fifth one in from the right hand side, is
7 it not?

8 ARBITRATOR WERTHEIM: Which page are you
9 looking at?

10 MR. LANE: On the first page, sir.

11 THE WITNESS: Yes. The fourth one from
12 the right.

13 BY MR. LANE:

14 Q And that is a local station, is it not?

15 A It is carried as local in Fall River,
16 although I must tell you that there is a bit of
17 controversy over that issue which exists to this day.

18 Q At least as Colony reported it on its
19 statement of account, it was reported as local?

20 A Yes.

21 Q And if we look at Lowell on the second
22 page, the same situation exists. Correct? It was
23 reported as local.

24 A It was reported as local through the first
25 four, I think. That was the point that I made,

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1 Dennis, when I said that with SBK one of the things
2 that happens is that in some cases, it is locally --
3 it is carried as a local, and there are some places in
4 New England where it is not a local.

5 Q But on your systems it is always carried
6 as a local?

7 A That's right.

8 Q I am sorry, except for Westerly. Is that
9 right?

10 A Let's see. I had trouble finding it on
11 this Westerly line up here. I see it.

12 Q The fifth one from the right.

13 A I see it. It is distant on Westerly.

14 Q Okay. Now, do you also see on Westerly,
15 let's just stay with that, one of my all time favorite
16 stations, WLNE?

17 A All right.

18 Q That is approximately right under the "N"
19 in "cable television," at the top of the page. Do you
20 see that.

21 A Carried as local in Westerly?

22 Q Carried as local. Do you know whether
23 WLNE carries Red Sox games as part of the SBK network?

24 A I am trying to remember now whether they -
25 - I am trying to relate to the 1990 - 1992 time

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1 period. I can't answer that one, Dennis, I can't
2 remember.

3 MR. LANE: At this time, Mr. Chairman, I
4 would like to introduce as 17-X, Program Supplier's
5 Exhibit 17-X.

6 (Whereupon, the document
7 referred to was marked for
8 identification as Program
9 Supplier's Exhibit No. 17-X.)

10 MR. MIDLEN: Excuse me. Are you finished
11 with 16-X?

12 MR. LANE: No. Copies of the comments of
13 the Office of the Commissioner of Baseball, and the
14 FCC docket number 93-21, implementation of section 26
15 of the Cable Television Competition Act of 1992, it
16 has Mr. Garrett's name on it, among others, and I have
17 just selected one exhibit from that, and I would ask
18 you to turn to that, Mr. Myhren.

19 The first page, it is actually the third
20 page of the exhibit, the first page is entitled
21 "flagship station." It has that as the first line, it
22 has the Boston Red Sox on the page. Do you see that?
23 It is the third page of the exhibit.

24 THE WITNESS: Somehow I am missing the Red
25 Sox. Oh, there. It is under the Orioles. Okay.

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1 BY MR. LANE:

2 Q Do you see WLNE identified as one of the
3 baseball regional television stations?

4 A I sure do.

5 Q Does that refresh your recollection as to
6 carriage of Red Sox on WLNE?

7 A I was trying to figure out what the time
8 period was, though. That was the thing that was
9 confusing me here.

10 It is certainly on there now, that is what
11 is being said.

12 ARBITRATOR WERTHEIM: The second page of
13 the exhibit says, "1994 or now."

14 THE WITNESS: Right, and as I said
15 earlier. I was confused as to the time period "or
16 now." It is on now. What I am trying to remember is
17 whether it was a member of this flagship station
18 organization back in the 1991-1992 period, and I just
19 can't remember.

20 BY MR. LANE:

21 Q Okay. Now, turning to page 5 of your
22 testimony, at the top of the page, and again, it is
23 the carry-over paragraph. You refer to the words,
24 "alternative sources."

25 So I guess I better ask you to define how

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1 you used it on page 5 here first.

2 A I will have to read the context there.
3 Yes. You know, for example, a place for movies as an
4 alternative source would be pay television, but
5 certainly there are -- for syndicated programming or
6 movies there are sources such as TNT, or a USA, or an
7 AMC, and the reason that I say that they are more
8 profitable for the cable operators -- the cable
9 operator, on a distant signal, doesn't have any
10 advertising availabilities.

11 All right. On those other programs, they
12 do have advertising availabilities. So that in fact,
13 I think the word "alternative" is properly used here.

14 Whereas I said I didn't use it properly
15 with regard to other sports programming earlier, but
16 the usage of movies for example, in other parts of the
17 programming line up is more profitable for the cable
18 operators there than it is on distant signals.

19 MR. LANE: Mr. Chairman, at this time I
20 would like to introduce as Exhibit 18-X pages from the
21 Factbook, you are familiar with the Factbook, are you
22 not, Mr. Myhren?

23 (Whereupon, the document
24 referred to was marked for
25 identification as Program

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Supplier's Exhibit No. 18-X.)

THE WITNESS: It depends which Factbook we have here.

BY MR. LANE:

Q Just in general, with the publication?

A As I know you are aware, there are a number of different Factbooks. This is one that I haven't tended to use, but it is the same type of format.

Q It is something that is used in the industry. Is it not?

A Publications like this are used. Yes.

Q Do you see I have copied the pages beginning on the second page, your Fall River system?

A Yes.

Q Then the Lowell system, then the New Bedford system, and then switching to Rhode Island, Pawtucket and Westerly.

There is no arrow drawn on the Pawtucket one. Sorry. That should be on the fourth page in the left hand column.

If you see Pawtucket and you just draw an arrow, then you will know to what I am referring.

Now, for each of these systems it identifies, let's just stay with Fall River because I

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1 think it is the same, and I will ask you this question
2 --

3 A Okay.

4 CHAIRPERSON JIGANTI: Mr. Lane?

5 MR. LANE: Sorry.

6 CHAIRPERSON JIGANTI: I am looking for a
7 convenient time to break. I think you are going to
8 get into a long line of questioning here.

9 Let's take a 10 minute recess.

10 (Whereupon, a 10 minute recess was taken
11 at 10:50 a.m.)

12 CHAIRPERSON JIGANTI: Okay, Mr. Lane, you
13 may continue.

14 CROSS EXAMINATION CONTINUED

15 BY MR. LANE

16 Q Thank you, Mr. Myhren. We are looking at
17 program suppliers' exhibit 18-x which was copies of
18 pages from the 1991 Fact Book.

19 A Yes.

20 Q And I just wanted to draw your attention
21 first to Fall River which appears on the second page
22 which is identified as page A-707.

23 Do you have that in front of you sir?

24 A I do.

25 Q And the Fall River entry does not list

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1 WGN, does it?

2 A No, I think we established that. It does
3 not.

4 Q It also lists, does it not, under Pay
5 Service # 4, in the right hand column, New England
6 Sports Network. Do you see that?

7 A I do see that.

8 Q And then right below that on Pay Service
9 # 6, Sports Channel, New England. Do you see that?

10 A Yes.

11 Q If I look through the other ones, are you
12 aware that those two services also appear on all your
13 other New England cable systems?

14 A Which two? The Sports Channel and --

15 Q The New England.

16 A And the New England Sports. Correct.

17 Q Could you tell us what those are?

18 A Those are pay television services that
19 have sports on them.

20 Q And what kind of sports do they have on
21 them, what teams?

22 A Oh, it has varied a bit over time as
23 contracts have run in and out. But certain games of
24 college and professional teams.

25 Q What professional teams?

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1 A I can't tell you precisely what during
2 that period of 1990-1992.

3 I mean I can't remember precisely.

4 Q Were the Red Sox on either of these during
5 1990-1992?

6 A The Red Sox might have had some games on
7 here.

8 (PAUSE)

9 Q This morning, I think that you said, but
10 I'll give you a chance to correct you if I am wrong,
11 that you wanted to leave syndicated series and movies
12 to the pay services because you could get more
13 revenues from that. Was I correct in my understanding
14 of what you said?

15 A I said that in effect -- well, first I
16 corrected that on syndicated because I said it was
17 unlikely that the syndicated series would end up on a
18 pay service because they wouldn't be bought by the
19 consumer. I think I did say that.

20 But with regard to movies, that would be
21 the ideal world, where all the movies would be up at
22 the pay level.

23 Q The reason that you would prefer that on
24 pay, as I understand it, is basically you would get
25 more money.

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1 A Correct.

2 Q Would the same thing apply to the New
3 England Sports Network and Sports Channel, that you
4 would get more money the more subscribers that took
5 those pay services for sports?

6 A Well, certainly we like to have sports on
7 pay television. But there's a difference between
8 sports and movies in that each sports event is an
9 unique event. So, that you bring us back to the
10 context that we are talking in which is the distant
11 signal context. In that one, there is a certain
12 amount of sports and that sports is unique and it is
13 perishable.

14 And because of that, that translation that
15 I make with movies doesn't really apply.

16 Q In your testimony, you talked about, did
17 you not, on page 3, the programming lineup for the
18 whole system? Right?

19 A On page three?

20 Q Right, at the bottom.

21 A I remember you asking about that earlier.
22 What we -- as you and I defined it there -- is it the
23 bottom of the page?

24 Q Yes, right under 3A.

25 A And we defined it as the programming

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1 lineup which is basic and expanding basic, but not
2 including pay.

3 Q Did Colony also have some systems in New
4 York State during the period, 1990-1992?

5 A It did.

6 Q I'm going to show the Witness several
7 pages of printout similar to what was in 17-x, but
8 these are for the New York system and Colony, and that
9 it be marked for identification as 19-x and moved into
10 evidence some time.

11 (Whereupon, the above referred-
12 to document was marked as
13 Program Suppliers' Exhibit 19-x
14 for identification.)

15 MR. GERSCH: Dennis, I just wanted to be
16 clear on this. You are going to move it into evidence
17 at some point, but not now?

18 MR. LANE: I'll move it now. I thought
19 after the Witness had a chance to review it, could
20 indicate these were the New York stations, New York
21 systems. I would move it at that point.

22 Q Are these the New York systems that were
23 owned by Colony during the period 1990-1992?

24 A I'm trying -- Dennis, I'm trying to
25 remember whether these are all of the systems.

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1 Certainly these communities -- we had cable in these
2 communities.

3 Q If you look at the bottom of the page,
4 you'll see that it has the other communities listed.
5 This is just what's called the principal community at
6 the copyright office.

7 A Okay.

8 Q Does that help you sir?

9 A Yes, that does help. That does help.

10 ARBITRATOR WERTHEIM: I noticed that these
11 pages are each dated December 8, 1995. Is it your
12 testimony, sir that the Colony ownership of stations
13 in New York state was the same in the period of 1990-
14 1992 as it was in 1995?

15 THE WITNESS: Well, by the time we get to
16 December 8, 1995, Judge, we don't own these systems;
17 Continental does. But that was only true as of
18 October 5, 1995 which was the closing of our deal with
19 Continental.

20 ARBITRATOR WERTHEIM: Are you saying that
21 in other respects you see a difference between this
22 data and what your 1992 ownership was?

23 THE WITNESS: What I'm saying is that I
24 think we did own these systems in the 1990-1992
25 period.

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1 MR. LANE: Judge Wertheim, if you look at
2 the left hand column under accounting period that
3 starting with 1979-1 we have each six month period
4 listed from the statements of account, on this page.

5 While the page comes with a summary of the
6 entire experience at the copyright office of this
7 system, I'm only focusing on the years 1990-1992.

8 MR. GERSCH: I believe that the December
9 8, 1995 figure in the upper left hand corner is the
10 date that the computer generated.

11 MR. LANE: Yes, exactly.

12 MR. GERSCH: That's what I've heard.

13 ARBITRATOR WERTHEIM: All right, everyone
14 is agreed on that.

15 MR. LANE: Yeah, that was -- in earlier
16 testimony we had some of the similar Cable Data
17 Corporation printouts. I think the lawyers are pretty
18 used to using that as the date it was generated, not
19 the date when the things were filed.

20 ARBITRATOR WERTHEIM: Maybe this is a good
21 point for me to note that, I'm sure many of you have
22 noticed that we ask a lot of questions that seem naive
23 to those knowledgeable about the industry, with the
24 hope that those questions will decrease as we continue
25 this process over the months.

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1 Those of you who are presenting your cases
2 earlier in the proceedings should not assume that you
3 are disadvantaged by having us hear you at our
4 beginning stage. We are all agreed that we are not
5 going to reach any conclusions until we have heard all
6 of the evidence from everybody.

7 (PAUSE)

8 CHAIRPERSON JIGANTI: Is there a question
9 pending, Mr. Lane.

10 MR. LANE: No, I -- the witness is looking
11 through it and I just thought I would give him the
12 chance to complete that before I started, if that's
13 agreeable with you?

14 THE WITNESS: If my bifocals hold up here,
15 I'll be all right.

16 Q Have you had a chance to look through
17 these pages in exhibit 19-x?

18 A Yes.

19 Q And do these pages comport with your
20 understanding of what the cable systems in New York
21 owned by Colony in the 1990-1992 period was?

22 A I'll be perfectly honest with you, I can't
23 remember these systems that closely, if you are
24 talking about the carriage.

25 Q I'm just talking about that these were

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1 your systems.

2 A Oh, as best as I can tell in looking at
3 this list at the bottom of the page where we list all
4 the communities, if those communities are subsumed in
5 these community names at the top of the page,
6 properly, then my guess is that this is correct.

7 Q Now, in looking at the call signs for the
8 period 1990-1992, were any of the super stations
9 listed as being carried in those years?

10 A I don't see any of them.

11 Q So, they were not listed as being carried?

12 A Well, what we have here, Dennis, is a
13 somewhat unique situation in that we have what really
14 amounts to what could be called distant sports that
15 are being carried on local signals, in effect. These
16 are relatively rural communities where they would have
17 trouble getting off-air, these things.

18 What you've got is WPIX and WWOR are being
19 delivered on the cable system with the sports there
20 which saves the cable system a reasonable amount of
21 money. It is not as important to be paying the
22 copyright fees to buy some additional distant signals.

23 Q But WPIX and WWOR were considered local
24 signals in the 1990-1992 period?

25 A For the rules, apparently so.

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1 Q And, for whatever reasons, these systems
2 did not see fit to carry any other super stations?

3 A That is correct.

4 It may have been determined locally here
5 that people didn't move in and out of these
6 communities a lot and didn't have quite the interest
7 that you generally find in out-of-area teams.

8 So, that could be part of the reason here.
9 I mean, I think that Rip Van Winkle grew up near here.

10 Q Do you know whether these systems carried
11 any regional sports networks during that period?

12 A I'm not sure. They might well have had
13 what has been called variously the Madison Square
14 Garden channel, might well have been brought up in
15 these communities.

16 But I'm sure you are going to tell me.

17 Q I always like to be helpful to my
18 witnesses on Cross.

19 MR. LANE: I'd like to introduce as
20 exhibit number 20-x, some pages from the black book
21 similar to what we have previously seen in exhibit 18-
22 x.

23 (Whereupon, the above referred-
24 to document was marked as the
25 Program Suppliers' exhibit 20-x

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for identification)

Q And these, are they not, Mr. Myhren, my first question will be, are the ones related to the New York systems we just discussed?

A I should be looking for arrows here, right?

Q I hope so.

A I'm not finding any.

Q All right. Beacon is the first on, is it not, on the first page?

A Beacon. Okay. So we should circle that one, okay.

Q Put a little arrow.

The next page it's at the far right hand bottom of the right hand column, Fishkill. And then it just carries over to the next page.

On page A-1059, it's Hyde Park in the second column. Do you see that?

A Yes.

Q On page A-1063, in the left hand column, it's Lloyd.

On the next page, A-1067, it's Monroe.

A Yes.

Q And on the next two pages, A-1088 it's Wappinger; it's way down on the right hand corner and

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1 then it carries over to the next page.

2 Do you see that?

3 A Yes, I do.

4 Q And these are the same systems that we
5 just discussed on exhibit 19-x, are they not?

6 A I'm trying to figure this out because they
7 don't seem to be lined up precisely the same way, are
8 they?

9 Q They are not lined up precisely.

10 A They are not.

11 Q There is apparently slightly different
12 definitions, but I think that if you looked at all of
13 the communities you would find that they were.

14 A That, by the way, not having spent a lot
15 of time with this kind of sheet, which I guess can be
16 inaccurate at times, I would guess it is probably
17 mostly accurate.

18 I have spent a lot of time with these
19 types of sheets and there a bunch of different sources
20 and they sometimes get a little bit confused.

21 Q Right.

22 A With that as a qualification, I would say
23 let's go into this.

24 Q Well, we could look at the end of each of
25 these entries, could we not, and see that the

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1 ownership was Colony Communications, Inc. as we see on
2 the first page for Beacon?

3 A Right. I see that.

4 Q We could go through that, if you would
5 like?

6 A In what --

7 Q Well, then we could go to Fishkill and
8 look at the back of that and see that Colony
9 Communications is listed as the ownership on the third
10 page, top of the second column.

11 A Sure. I'm assuming -- I just have to try
12 to figure out which of the communities are inn each of
13 the groupings that they have here.

14 Q I'm not going to try -

15 A But that's not --

16 Q I'm not going to try to match them
17 precisely, if that saves you some anxiety.

18 A Okay.

19 Q If I look at this, just sticking with
20 Beacon to start off with, there are no super stations
21 listed as being carried in Beacon, are there, on
22 exhibit 20-x? As distant signals.

23 A No. They are sort of what I might call
24 foreign stations that have sports but no distant
25 signals.

1 Q Right. For royalty purposes.

2 A For royalty purposes, correct.

3 Q And that, you are referring to I take it,
4 WPIX and WWOR.

5 A And WWOR, right.

6 Q And as we established, these are both
7 local stations in these communities.

8 A Right.

9 Q I also see, if sticking with Beacon on the
10 first page of exhibit of 20-x, you see there is an
11 expanded basic one service listed there in the right
12 hand column, about a quarter of the way down the
13 column?

14 A Right. I do see that.

15 Q And you see Madison Square Garden Network
16 listed there?

17 A Yes. That was the one that I mentioned
18 earlier, I thought was carried.

19 Q You were referring to that?

20 A Right.

21 Q Is it your understanding that that is a
22 channel that offers sports programming?

23 A Yes.

24 Q Do you know what kind of sports program
25 they offer?

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1 A They have some games and they have some
2 commentary and interview shows, you know, things of
3 that type.

4 Q And by games, do you include live
5 professional sports events?

6 A Yes.

7 Q And you see, just a little further down
8 the column from that, in Pay Service # 5, Sports
9 Channel, New York?

10 A Yes.

11 Q And to your knowledge, is that a channel
12 on which you can receive live sports events?

13 A I believe it is.

14 Q And we go to the third --

15 A I think for the Panel's understanding, by
16 the way, on these, which are pay services, they are
17 not basic or expanded services. The fare on these
18 type of services changes as you go over the years, as
19 contracts with various sports teams come in and go
20 out, so that there is some variability on this.

21 But, generally, there are some games on
22 this.

23 ARBITRATOR FARMAKIDES: Is this a regular
24 occurrence, Mr. Myhren?

25 THE WITNESS: You mean that contracts

1 change?

2 ARBITRATOR FARMAKIDES: No, no. Where you
3 have local stations carrying sports in lieu of the
4 super station?

5 THE WITNESS: The super station.

6 If you go around the country -- we are
7 talking about very small markets here, okay?

8 If you go into most major markets in the
9 country, the broadcasters in that market -- somebody
10 will have some sports packages, often of their own
11 teams, teams from that area. That's fairly typical.

12 This is a bit of a strange duck in that --
13 You know, as you get up into New York State, going
14 away from New York City, you get up into places where
15 there are huge hills and valleys and reception really
16 isn't' very good.

17 So, even though you might define a New
18 York station as local, it is something that a lot of
19 people can't receive unless they have cable. Because
20 cable will pull that thing off the air and get it to
21 everybody in the hills and valleys.

22 And that is real good from a cable
23 operator's perspective because he's receiving a local
24 channel which has these sports from New York city and
25 he's giving it to these folks. And he doesn't have to

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1 pay any copyright, because the definition for
2 copyright purposes is sort of geographical concentric
3 circle.

4 So, this situation that we are talking
5 about here is not a typical one, in the copyright
6 sense.

7 ARBITRATOR WERTHEIM: Taking this to the
8 Beacon system, as an example, the information in
9 exhibit 20-x indicates that it is located in Wappinger
10 Falls, New York? Does that sound right to you?

11 THE WITNESS: Well, what it means is that
12 the office is in Wappinger Falls.

13 ARBITRATOR WERTHEIM: Well, how far is
14 this system from New York City?

15 THE WITNESS: In terms of air miles, I'm
16 not precisely sure. But it is close enough so it is
17 defined as a local signal.

18 ARBITRATOR WERTHEIM: Well, that's what I
19 was getting at.

20 THE WITNESS: Yes.

21 ARBITRATOR WERTHEIM: Is this the 75 mile
22 limit of FCC rules that defines it as local?

23 MR. LANE: Thirty-five, is the one to
24 which we have been referring.

25 Q Isn't 35 miles your understanding of the

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1 FCC rules, to the extent that you have an
2 understanding?

3 A I think 35 miles -- well, it's been
4 changed a couple of times.

5 Q Right.

6 A As you know. And we have to take
7 ourselves back to the 1990-1992 period and then I'll
8 ask precisely what was it in the 1990-1992 period,
9 because it has changed.

10 CHAIRPERSON JIGANTI: The significance of
11 it is that you don't know.

12 THE WITNESS: Well, I recognize that.

13 ARBITRATOR WERTHEIM: Well, whether it is
14 local or not is defined by FCC rules.

15 THE WITNESS: Is defined by FCC rules.
16 And what is important here --

17 ARBITRATOR WERTHEIM: So, it's not
18 necessarily the same as copyright rules?

19 MR. LANE: Could I just interject a
20 question?

21 ARBITRATOR WERTHEIM: Feel free to
22 clarify.

23 MR. LANE: Okay.

24 Q If, assuming that exhibit 19-x is correct,
25 that it was identified as a local --

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1 A A local signal.

2 Q That means for royalty purposes, you paid
3 not royalties?

4 A That is correct. We paid no royalties.

5 Q And presumably you made that or some made
6 that decision based on their interpretation that the
7 --

8 A Of the rules.

9 Q FCC rules, as applied to the copyright
10 payment, define this as local, and therefore there was
11 not reason to make payment.

12 A Right. Because there was a tie between
13 the FCC rules and the copyright payment, exactly.

14 So, it was defined in this case as local.
15 And it goes a long way to explaining why there were
16 not distant signals bought by these cable systems.
17 Because they had some distant sports.

18 What, for most of their subscribers were
19 sports that the people couldn't get off the air, that
20 they could import for them. And they had the
21 advantage, in this particular case, of not paying for
22 them because of the way the rules work and because of
23 the strange topography of this area.

24 ARBITRATOR FARMAKIDES: Now, is this
25 decision made in a coordinated effort by officials of

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1 your company?

2 Whether they carry, for example, distant
3 signals or carry these local stations in lieu of the
4 distant signals.

5 THE WITNESS: The way that works in our
6 company -- or worked in our company and in my previous
7 company and works for most cable companies, is that
8 people at the headquarters level weigh-in with certain
9 opinions on these things.

10 But the people at the individual system
11 level who are responsible for the P&L of that system
12 and have to recognize what the appeals of the various
13 things are and what the cost is going to bring that
14 appeal, make that decision, typically, in the end.

15 ARBITRATOR FARMAKIDES: Now, do they base
16 their decision also on surveys that are made in-house,
17 locally, by the in-house?

18 THE WITNESS: Yes.

19 ARBITRATOR FARMAKIDES: You do make your
20 own surveys?

21 THE WITNESS: People do their own surveys.

22 ARBITRATOR FARMAKIDES: So, at the local
23 level and also at the headquarters level, you make
24 your own surveys?

25 THE WITNESS: Right.

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1 ARBITRATOR FARMAKIDES: These then would
2 be surveys that may or may not confirm the Bortz
3 survey or the Neilsen survey?

4 THE WITNESS: Yeah. Let me say, Judge,
5 that some systems make more surveys than others.
6 Okay? I mean this is not something that is done
7 uniformly across the business.

8 But there are local surveys done, often,
9 by cable systems, and there are surveys that are done
10 about appeals and viewer preferences and so on, that
11 are done on a national basis, as well.

12 ARBITRATOR FARMAKIDES: But the trust -

13 THE WITNESS: The decision usually ends up
14 down at the individual cable system level.

15 ARBITRATOR FARMAKIDES: But the thrust in
16 all of this is to increase your cash flow?

17 THE WITNESS: The thrust in the end is to
18 make more money, right.

19 ARBITRATOR FARMAKIDES: Thank you.

20 Q Mr. Myhren, --

21 A I should say in defense of the honor of it
22 all that you make more money when you appeal to more
23 subscribers and treat them right. But in fact, what
24 you are trying to do, in the end, is make more money.

25 Q Mr. Myhren, could you go back to exhibit

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1 17-x, which is the comments of the Commissioner of
2 Baseball?

3 A Was that the first one you handed out?

4 Q It was the second one.

5 A Somehow I -- oh, wait; I've got it.

6 Q You have it?

7 Now, Judge Farmakides just asked you a
8 question about the availability of sports programs
9 locally, and putting aside the years that are
10 involved, would this list be all the stations to your
11 understanding that carry --

12 Let's just turn to the first page, the
13 Boston Red Sox -- in addition to WSBK, WBBG in
14 Springfield, Massachusetts carried Red Sox games.
15 WLNE, New Bedford carried, et cetera, going on down
16 the list.

17 A Your saying do I know that in 1990-1992 or
18 1994 this is true? This is a 1994 report.

19 Q I'm not asking you about the date.

20 A Okay.

21 Q I'm asking you if you are aware that
22 baseball clubs do have what is termed here as regional
23 television networks?

24 A Yes, I am aware of that.

25 Q And if this is an accurate representation

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1 that the regional television network for the Red Sox
2 was on over-the-air broadcast stations in Springfield,
3 New Bedford, Waterbury, Connecticut, Hartford --

4 A You are getting a little beyond me on that
5 one because obviously those networks change over time.
6 We didn't have cable systems in a lot of those
7 markets, so I really wasn't --

8 Q I'm just asking more of the idea of it;
9 this is what a regional sports network is, in your
10 understanding?

11 A Yeah. I have to be specific on this,
12 Dennis. I can't vouch for all of the listed stations
13 and communities here because a lot of them I didn't
14 pay any attention to.

15 Q Sure.

16 A They weren't part of our business. But I
17 will say that the idea that there are -- there's a
18 flagship station and the games are carried in some
19 other markets or on some other stations, regionally,
20 is not untypical.

21 Q And those are over-the-air stations, they
22 are not cable networks.

23 A Those are broadcast television stations.

24 Q Right.

25 A Yeah.

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1 MR. LANE: Those are all the questions I
2 have, Mr. Chairman. And I would move at this time for
3 the admission of exhibits 16 through 20-x.

4 CHAIRPERSON JIGANTI: Any objection to the
5 admission of those exhibits?

6 MR. GERSCH: Yes, Your Honor. No
7 objection to 16. Nineteen, we had already admitted
8 and have not objection to. With respect to 17, which
9 was both incomplete and 1994 data and to which I don't
10 think the Witness indicated he could sponsor, we do
11 object. So that is 17.

12 Do you want me to do these all at once?

13 CHAIRPERSON JIGANTI: No. First, let's
14 take number 16.

15 MR. GERSCH: No objection.

16 CHAIRPERSON JIGANTI: Does anybody else
17 have any objection?

18 MR. MIDLEN: The devotional clients object
19 to 16 in so far it contains a great deal of
20 information that the Witness didn't testify.

21 And the compiler of 16-x and 19-x is Tom
22 Larson who is a devotional claimant's witness in this
23 proceeding and you will see him in a totally different
24 context later on. He is not here to support the work
25 that Cable Data Corporation has produced.

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1 CHAIRPERSON JIGANTI: So, your objection
2 to it is that it contains more information than the
3 Witness is able to support?

4 MR. MIDLEN: Exactly.

5 CHAIRPERSON JIGANTI: And that's both the
6 16 and the 19?

7 MR. MIDLEN: Exactly.

8 CHAIRPERSON JIGANTI: Any response to
9 that, Mr. Gersch?

10 MR. LANE: No, they are my exhibits, sir.

11 CHAIRPERSON JIGANTI: Forgive me. Sorry,
12 Mr. Lane.

13 MR. LANE: Thank you.

14 CHAIRPERSON JIGANTI: That was the problem
15 the other day. We kept referring to somebody as your
16 witness and it wasn't your witness.

17 MR. LANE: They are not my witnesses, but
18 they are my exhibits.

19 CHAIRPERSON JIGANTI: Okay, very good.

20 MR. LANE: I think the Witness testified,
21 generally, about the size of the systems. I'm not
22 particularly interested in those. I was more
23 interested in the questioning focused on the extent of
24 the carriage to which the Witness did answer all the
25 questions.

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1 If you would like to strike the rate,
2 subs, gross receipts and royalty columns, I wouldn't
3 have a problem with that. I think that would solve
4 Mr. Midlen's objections.

5 (PAUSE)

6 CHAIRPERSON JIGANTI: Counsel, you have no
7 objection to the exhibit? Do you have objections to
8 the exhibit as modified by Mr. Lane, in reference to
9 striking out rates, subs, royalties and gross
10 receipts?

11 MR. MIDLEN: Well, Your Honor, I think
12 that covers a great deal of my objection. However,
13 there is still left a substantial amount of
14 information in the exhibit to which the Witness did
15 not testify.

16 For example, looking at 16-x.

17 CHAIRPERSON JIGANTI: That he did not
18 testify or he was not able to --

19 MR. MIDLEN: That he did not address in
20 his testimony.

21 For example, looking at 16-x --

22 CHAIRPERSON JIGANTI: Are you suggesting
23 then, are we talking now, about sponsoring? Are you
24 saying that he can't sponsor some of this testimony,
25 is that it?

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1 MR. MIDLEN: The Witness was not the
2 sponsor of this, was not properly the sponsor of this
3 exhibit. The total exhibit is labeled as having been
4 compiled by Cable Data Corporation, by Thomas Larson.
5 And Mr. Larson is not here to support this exhibit.

6 This witness has identified certain
7 aspects of the information in the exhibit.

8 CHAIRPERSON JIGANTI: So that I understand
9 you, the nature of your objection is what?

10 MR. MIDLEN: That the exhibit does not
11 have a proper sponsoring witness, and that this
12 Witness, the witness that is on the stand, has not, in
13 any way, shape or form qualified as able to sponsor
14 the exhibit.

15 CHAIRPERSON JIGANTI: All right. On that
16 specific issue.

17 Mr. Lane?

18 MR. LANE: Mr. Chairman, I asked the
19 Witness if these were if these were indeed the Colony
20 systems and he indicated that they were in the period
21 1990-1992.

22 I asked him and you recall he spent a
23 considerable amount of time looking through the
24 stations, indicated that they were indeed the stations
25 that were carried and we had several questions on

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1 that. The Witness was able to answer all those
2 questions clearly.

3 He could sponsor the indications. Whether
4 he did this or not, we have also used, as you know, a
5 lot of Cable Data Corporation information in these
6 cases. It's just a very short hand way of us doing
7 that.

8 But more important, I believe that the
9 Witness was able to answer all my questions concerning
10 these two exhibits about the carriage.

11 CHAIRPERSON JIGANTI: To be fair, Counsel?

12 MR. MIDLEN: I agree with Mr. Lane
13 completely. He answered some questions about some of
14 the information in these exhibits. And that is
15 testimony; it is in the record. We don't object to
16 that.

17 But, for example, just looking at page
18 one, of 16-x, we didn't touch on station WGBX at all.

19 CHAIRPERSON JIGANTI: So, your contention
20 still is that he is not a sponsoring witness.

21 MR. MIDLEN: We looked at WWOR, WPIX.

22 CHAIRPERSON JIGANTI: Counsel, excuse me.
23 You made your argument, we heard your argument.

24 Any other comments concerning this?

25 (PAUSE)

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1 CHAIRPERSON JIGANTI: The panel has
2 consulted on the matter, and as modified by Mr. Lane,
3 exhibit number 16 will be admitted.

4 (Whereupon, the above referred-
5 to exhibit was admitted as
6 Program Suppliers' Exhibit
7 number 16-x).

8 MR. HESTER: Your Honor, Timothy Hester.

9 CHAIRPERSON JIGANTI: Yes.

10 MR. HESTER: I would ask Mr. Lane, if I
11 could, for one clarification on exhibit 16.

12 We have discussed the meaning of the D and
13 L references in the columns of data there.

14 There are some Xs that also appear, and I
15 thought that for purposes of clarity of the record, it
16 would be useful simply to explain what's meant by
17 that.

18 MR. LANE: An X means that that is a
19 partially distant signal.

20 CHAIRPERSON JIGANTI: That satisfactory?

21 We've got 16. The next exhibit, number
22 17.

23 MR. GERSCH: We object to the admission of
24 17 into evidence.

25 CHAIRPERSON JIGANTI: The basis of your

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1 objection?

2 MR. GERSCH: The basis is that this
3 reflects the 1994 carriage. The Witness was unable to
4 determine whether this would be typical of 1992.

5 In addition, it's an incomplete exhibit.

6 CHAIRPERSON JIGANTI: Counsel, your
7 response?

8 MR. LANE: First of all, I thought since
9 we had introduced -- I can't remember now. I think we
10 had introduced another part of these comments and I
11 thought that the sports claimants were going to
12 introduce the whole thing.

13 I recognize this is 1994. I think this
14 exhibit was introduced more for the purpose of showing
15 that there are regional sports television networks.

16 CHAIRPERSON JIGANTI: If you have that in
17 testimony, what do you need the exhibit for?

18 MR. LANE: All right, fine. I'll withdraw
19 the exhibit 17.

20 CHAIRPERSON JIGANTI: Withdrawn.

21 MR. GERSCH: Mr. Chairman, if I could just
22 note that the prior effort to admit the comments was
23 withdrawn and it is not in evidence.

24 So, the comments of the Commissioner are
25 not in evidence.

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1 MR. LANE: I knew they would be keeping
2 track of my exhibits.

3 (LAUGHTER)

4 MR. GERSCH: That's my job.

5 CHAIRPERSON JIGANTI: Number 18? You are
6 moving that?

7 MR. LANE: I'm moving 18.

8 CHAIRPERSON JIGANTI: Any objections?

9 Hearing no objections, that will be
10 admitted.

11 (Whereupon, the above referred-
12 to document was admitted as
13 Program Suppliers' Exhibit
14 number 18-x.)

15 CHAIRPERSON JIGANTI: Number 19? I think
16 that is the same as number 16.

17 MR. MIDLEN: Yes.

18 CHAIRPERSON JIGANTI: The positions of the
19 parties are the same?

20 ARBITRATOR WERTHEIM: You are making the
21 same modification there, Mr. Lane?

22 MR. LANE: Yes, sir.

23 CHAIRPERSON JIGANTI: It will be admitted
24 as modified.

25 (Whereupon, the above referred-

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1 to document was admitted as
2 Program Suppliers' Exhibit
3 number 19-x.)

4 CHAIRPERSON JIGANTI: And number 20. Any
5 objection to number 20?

6 Hearing no objections, it will be
7 admitted.

8 (Whereupon, the above referred-
9 to document was admitted as
10 Program Suppliers' Exhibit
11 number 20-x.)

12 MR. GERSCH: No objections.

13 MR. LANE: Thank you.

14 CHAIRPERSON JIGANTI: The next cross
15 examiner for Mr. Myhren?

16 MR. HESTER: I do have something. I
17 discussed with counsel the order we would go in.

18 CROSS EXAMINATION

19 BY: MR. HESTER

20 Q Good morning. My name is Timothy Hester.
21 I represent the public television claimants.

22 I wanted first, if I could, to refer your
23 attention back to Program Suppliers' exhibit 18-x.
24 And if I could direct your attention specifically to
25 the reference on the second page to the Fall River

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1 system.

2 Do you see in the first paragraph under
3 Fall River there is an entry, Channel Capacity:, and
4 then it refers to 40 channels. Is that the way you
5 read that?

6 A That's the way I read it, yes.

7 Q And it says 'channels available, but not
8 in use: none'. Do you see that?

9 A I do.

10 Q Is that your recollection of the
11 circumstances during that period?

12 A I think during that period that was
13 largely true.

14 Q And if I could --

15 ARBITRATOR WERTHEIM: Excuse me. I don't
16 know if you are the right witness to ask this at this
17 time, but what is it that determines the capacity?

18 I see on this one page we have Fall River
19 with 40, we have Fair Haven with 52, we have East
20 Hampton with 35.

21 What accounts for these variations?

22 THE WITNESS: It's the electronics of the
23 cable system. A cable system is made up of -- it
24 starts in the head end where all the signals are
25 brought down and then transmitted over the cable.

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1 The type of cable you have somewhat
2 determines it. The type of equipment that you have
3 pushing the signals across the cable somewhat
4 determines it.

5 CHAIRPERSON JIGANTI: Was that optional
6 with the system operator what type of cable was put
7 in?

8 THE WITNESS: It often is determined by
9 when the cable system was built or when it was
10 rebuilt. Because typically, people will put about as
11 much capacity on a system as was available at the time
12 that they did that.

13 But, as the years have gone by, the
14 electronics have improved so the capacity has
15 increased.

16 CHAIRPERSON JIGANTI: But there is nothing
17 in any rule or regulation that limits it? It's just
18 the state of the art at the moment?

19 THE WITNESS: That's right. Although, in
20 municipal franchise documents, the document between
21 the municipality and the cable operator, sometimes
22 there is a requirement that it be at least a certain
23 level.

24 ARBITRATOR WERTHEIM: Thank you.

25 Q Are there dollar investments required to

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1 expand the channel capacity once the capacity is set
2 at a given level?

3 A A substantial dollar investment.

4 Q So the capacity at any given time is a
5 constraint on the operations of the system.

6 A Yes. Once you have built it, you are
7 constrained to a certain degree.

8 Sometimes you can make what is called an
9 electronic upgrade. And that electronic upgrade
10 allows you to put certain electronics at the head end
11 and on the cable system as you are going on down
12 toward the subscriber which upgrades the number of
13 channels. You might go from 32 to 40 channels with an
14 electronic upgrade, for example.

15 But in other cases, you have already, as
16 they say in the business, maxed out the capacity and
17 you may have to rebuild the whole thing to get
18 additional channels.

19 It's variable, but it is always costly, to
20 some degree.

21 MR. HESTER: Let me ask you to look
22 through a few pages further back in PS exhibit 18.
23 The reference to the Lowell system.

24 Again, this shows that the system was
25 operating at full capacity and did not have any

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1 channels available but not in use, is that right?

2 A Right.

3 Q Is that your recollection?

4 A I can't remember that, precisely.

5 I typically found with cable systems that
6 when there is some controversy over carriage of a
7 particular channel, or addition of a few channels, for
8 me to get up to speed, I always have to say to our
9 engineers, remind me of what the electronics of that
10 system are and what we can do with it.

11 So, to remember back to what it was like
12 in that system in 1990-1992, I just don't remember.

13 Q Do you have any reason to doubt the
14 reference here?

15 A They might well be right. My only reason
16 for doubt was the one that I expressed earlier to
17 Dennis which is that there are a lot of books like
18 this and sometimes they get it right and sometimes
19 they don't.

20 Q Let me ask you to look further back to the
21 Westerly system which is listed on the next to the
22 last page of the exhibit.

23 There is a reference here to a channel
24 capacity of 40. Do you see that?

25 A Yes, I do.

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1 Q And it says that 'channels available but
2 not in use: none.'

3 Does that accord, generally, with your
4 recollection?

5 A I think that particular one I remember
6 fairly well and I think that is true.

7 Q And why do you remember that one
8 particularly well?

9 A There were always channel capacity
10 questions and controversies over what was going to be
11 carried and what wasn't going to be carried.

12 Q So that system was facing some difficult
13 problems of selecting among --

14 A Among their opportunities to carry, right.

15 Q Is it fair to say, as a general
16 proposition, that a cable system would not carry a
17 distant signal unless it had made the judgement that
18 that distant signal added to the value of their
19 programming mix?

20 A That is correct, because they had to pay.

21 Q So, when the cable system decides to bring
22 in a signal, it's making a judgement that that signal
23 is worth at least as much as it is paying out in
24 royalties?

25 A Can I go a little farther?

1 Q Sure.

2 A In fact, I can't imagine a situation and
3 I have never heard of one, in which a cable operator,
4 where, for example a reasonable amount of sports on a
5 distant signal, would not have opted to carry it.

6 But the operator is constrained by two
7 things: One is the channel capacity and the other is,
8 what is the cost? Because it always adds value. It's
9 just a question whether, in this particular case, can
10 I get it on the system, and then the next one is how
11 much does it cost to put it on?

12 Q And the significance of the channel
13 capacity point is that when the operator decides to
14 bring in a distant signal, it's forgoing other
15 programming opportunities? Is that right? Is that
16 the significance of the channel capacity?

17 A Oh, yes. Absolutely. It is really a
18 choice among a broad array of possibilities which are
19 distant signals. All kinds of cable channels that are
20 available if you chose to carry them which has nothing
21 to do with distant signals that are being broadcasted.

22 They are just things that you can bring
23 down by satellite because they are put up there by
24 someone who has created a new cable channel and wants
25 you to carry it.

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1 There are vastly more channels to day than
2 there were in the 1990-1992 period than there was
3 channel capacity to carry.

4 Q Now, I wanted to ask you to imagine for a
5 moment, a cable system that didn't have available a
6 local public television signal.

7 A Okay.

8 Q So, the only way it could carry a public
9 television signal is by a distant signal.

10 A Okay.

11 Q In that circumstance, would you agree with
12 me that that distant public television signal is quite
13 important to that cable operator.

14 A We might not agree on the exact level of
15 importance, but I would say it is important if you
16 don't have public television on a system, to put some
17 on.

18 Q And why would you say that's true?

19 A Because, it once again goes to this issue
20 that I think is at the core of the programming
21 decision made by the cable person, which is, I want to
22 offer each niche -- I want every niche covered.

23 And if I don't have every niche covered,
24 that's where I get into a problem in not appealing to
25 a certain part of the community that I want to appeal

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1 to.

2 Now, they are not going to be cable
3 subscribers. I haven't quite given them the thing
4 that they are most interested in.

5 It is sort of the reason why this
6 profusion of movie and syndicated programming which is
7 available lots of places on the cable programming
8 lineup; you just don't need more of that. You've
9 already got that. Covered that base.

10 If, in that same situation, I don't have
11 public television at all, then I better have some.
12 It really goes to the mechanism by which the cable
13 operator makes his decision so that he can gain
14 subscribers.

15 Q And I take it, part of the point that you
16 are making here is that as to public television, there
17 is a certain kind of programming on public television
18 that you can't find anywhere else. So the cable
19 operator needs to have some?

20 A Well, I think that that is a judgement
21 that has to be made and it changes as the years go by.
22 But, there is Arts and Entertainment now. There are
23 various people, there's a history channel. There are
24 certain things on CNN, certain discussions that are
25 much like what you might find on PBS.

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1 So that niche that PBS had is obviously
2 being eroded. But I still think there is a niche.

3 Q And let me ask you specifically during the
4 1990-1992 period do you recall if that was the time
5 frame when PBS broadcast the Civil War series produced
6 by Ken Burns?

7 Do you recall that?

8 A Sure.

9 Q And do you recall --

10 A I didn't realize that that was the precise
11 time, but I do remember the series.

12 Q I'll tell you it was during 1990.

13 A Okay.

14 Q And on that representation, well actually,
15 I should amend that. Actually, I believe it was in
16 1991.

17 The Civil War was a series that was not
18 available anywhere else on television, is that right?

19 A At that point, it was not.

20 Q So, for those viewers that wanted --

21 A Not the Ken Burns Civil War was not
22 available.

23 Q Right. For those viewers that wanted to
24 see the Civil War series, that was the only place that
25 they would have been able to see it, on public

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1 television.

2 A Yes.

3 Q This goes back to your discussion of
4 sports before. There are certain sporting events that
5 the viewer can only see by watching a given channel,
6 is that right?

7 A Yeah. I think that what you point out is
8 the similarity in the what I consider the rational
9 process of the cable operator in valuing these things
10 there.

11 The difference that I would point out, is
12 that with the sports event, you'll never get a chance
13 to see that one again.

14 Q Right.

15 A Okay. Where it means anything to you.

16 Q Right.

17 A With the Ken Burns series, you will get a
18 chance to see it again.

19 So, to that extent, there is a difference
20 here.

21 But to the extent that there was no other
22 place to get this and it hadn't been shown anywhere
23 else before, okay? I buy your point on that one.

24 Q Is it also your experience that families
25 with children are a particularly important source of

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1 cable subscribers?

2 A Yes, they are.

3 Q And is there significant children's
4 programming on PBS that can be of value to families
5 with children?

6 A Certainly PBS has developed, over the
7 years, some children's programming. I happen to be a
8 believer that what Nickelodeon has done, for example,
9 is outstanding.

10 That's on cable also and if you have
11 Nickelodeon, the programming on PBS is not quite as
12 important.

13 You also know that cable's own programming
14 that is generated on its own and its various channels
15 has won a lot of awards for children's programming.
16 So, the PBS programming is not unique in that sense,
17 but I would say that PBS has a reputation among folks
18 for children's programming.

19 Q And the Nickelodeon programming you are
20 thinking of would not be oriented toward the youngest
21 of children, is that right?

22 A To the youngest, that's right.

23 Q And PBS has developed Sesame Street and
24 other programming that isn't available elsewhere for
25 very young children. Is that right?

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1 A Yes.

2 Q I won't ask you to vouch for the purple
3 dinosaur, but you recall that Barney was a series
4 developed during the years 1990-1992.

5 A I don't remember the precise timing, once
6 again, but I do remember Barney.

7 Q That was a program of particular interest
8 to families with small children, I take it.

9 A I think that most people would say that
10 Barney was good children's programming.

11 Q Let me ask you to turn, if you could, to
12 Program Suppliers' exhibit 16-x. It is the Cable Data
13 printout.

14 I would like to direct your attention to
15 the last page which deals with the Westerly cable
16 system.

17 Do you see that page?

18 A Yes.

19 Q Tell me where Westerly is located. I take
20 it, it is located in Rhode Island?

21 A It's in Rhode Island, right almost on the
22 Connecticut border. So it is just east of
23 Connecticut. You know the Connecticut and Rhode
24 Island runs east to west instead of north to south.

25 Q And Westerly was the system that you

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1 mentioned a few minutes ago as having particular
2 problems with channel capacity during this period?

3 A I'm saying that yes, I remember that it
4 did have some problems, it seems, until fairly
5 recently.

6 It's in the process of being rebuilt and
7 it's almost rebuilt.

8 Q So, today it is in the process of
9 expanding its capacity?

10 A Yes.

11 Q But during the years 1990-1992 --

12 A From 1990-1992 it was still having those
13 problems.

14 Q I wanted to ask if you agree, looking at
15 this, that the Westerly system, during the years 1990-
16 1992 had imported WGBH as a distant signal?

17 A It looks here like it was imported through
18 the second six months of 1992, is what it says. It
19 looks like it is still being imported through the end
20 of 1994, but it was being used on a part time basis.

21 Q And WGBH is a PBS station, is that right?

22 A It is the Boston PBS.

23 Q With a well-know variety of public
24 television programming?

25 A Yes.

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1 Q This system also imported another
2 educational signal on a distant basis, WFXT, is that
3 right?

4 A Yes. I'm trying to remember. That is an
5 education station. I'm trying to remember where that
6 is from.

7 Q I was hoping you could help me.

8 A I think that is from New Haven, but I'm
9 not --

10 Q During the period in question, that was
11 another public television or non-commercial station
12 imported by this system on a distant basis, right?

13 A I think so. As I said, I am a little bit
14 imprecise on this.

15 Q In terms of remembering what the station
16 was?

17 A What the station was and where it
18 originated from.

19 Q Do you see, at the top of the page, it is
20 denoted as having an 'E', stands for educational?

21 A Yes.

22 Q So, that would be a non-commercial.

23 A Yes. That makes sense.

24 Q Do you see that there is also shown here
25 two educational or non-commercial signals that were

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1 being carried by this system on a local basis?

2 A I'm trying to find -- oh, okay. I finally
3 found.

4 Q One of them is WEDN, is that right?

5 A Yes.

6 Q And the other one that was carried on a
7 local basis was WSBE?

8 A Right, I see them both.

9 Q So, this is a cable system that had
10 decided to carry two distant public television signals
11 as well as two locals, is that right?

12 A I think what is evident is that it got rid
13 of WFXT before the period we are talking about here.

14 No, no, sorry. These columns are hard to
15 read.

16 Q Yes. Well, maybe we should just make sure
17 we working through.

18 A Right, WFXT is carried and then dropped in
19 1994.

20 Q But during the period of 1990-1992?

21 A During the period we are talking about it
22 is still there.

23 Q And during the period 1990-1992, WGBH was
24 carried as a distant signal as well?

25 A Right.

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1 Q And during that same period, 1990-1992,
2 this system was carrying two local public television
3 signals on a local basis.

4 A That is correct. And I would tell you
5 that remembering back -- this is why I kind of sparked
6 to Westerly when you first mentioned it.

7 In fact, there was a lot of controversy in
8 Westerly with a 40 channel or so system and four
9 public television stations. Which is why, later on,
10 obviously, there aren't as many.

11 But there was something with regard to the
12 franchise document with the city and the position that
13 the City Council took on this that kept four stations
14 on there.

15 In other words, it was not the cable
16 operator's choice to have four public television
17 stations. As you can see, later on, that played out
18 and they went away when it got resolved.

19 But at that time, there were four because
20 the -- not the community of viewers, but the City
21 Council insisted on it.

22 That's the way I remember that.

23 CHAIRPERSON JIGANTI: Excuse me, just a
24 second.

25 It appears, just looking at 16-x and 18-x

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1 that despite what is shown on the last page of 16-x,
2 that WFXT was actually an independent Fox station.
3 All the other references to WFXT on exhibit 16-x
4 indicates that it is an 'I' for independent.

5 If you look at 18-x which is from the fact
6 book, all the references are that it is a Fox station.

7 THE WITNESS: Okay.

8 CHAIRPERSON JIGANTI: And I would just
9 note that for the record.

10 THE WITNESS: I think that would be
11 helpful in understanding why I couldn't quite figure
12 out where it originated from as a public station.
13 Although, this clearly says it is supposed to be a
14 public station. I would guess that that comment is
15 correct.

16 CHAIRPERSON JIGANTI: Mr. Hester, we are
17 about due for a break for lunch and I didn't know you
18 were going to finish with witness and I have no idea
19 if anybody else is going to examine this witness.

20 MR. HESTER: I have a few more questions,
21 Your Honor, that's all.

22 CHAIRPERSON JIGANTI: Does anyone else
23 want to examine this witness? Will your testimony may
24 take a while? I don't mean to limit you.

25 MS. HAND: Probably less than half an

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1 hour.

2 CHAIRPERSON JIGANTI: At this time we will
3 take a break for lunch.

4 (Whereupon, the proceedings recessed at
5 12:11 p.m.)

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A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S

(1:16 p.m.)

CHAIRPERSON JIGANTI: You may proceed when you're ready, Mr. Hester.

MR. HESTER: All right.

CROSS EXAMINATION (Continued)

BY MR. HESTER:

Q Mr. Myhren, before lunch we were discussing the Westerly cable system. We were on Program Suppliers Exhibit 16-X. Let me just finish up that discussion. Do you have that exhibit still in front of you?

A Yes, I do.

Q And you mentioned before lunch an obligation that had been posed on that cable system by some sort of municipal licensing requirement. Could you --

A Well, it wasn't -- it wasn't as precise as a municipal licensing requirement. It was the City Council, as I remember it. And, obviously, this is a time back, but it was the City Council saying, "Hey, we want you to continue carrying" -- I think in this case it was WGBH. I think what we established earlier, if I remember this correctly, is we don't have four educational stations here; we have three.

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1 But -- but the question was, how does one
2 get down to two for the system management who
3 desperately wanted to get down to two. But they --
4 they -- they ran into some flack from the City Council
5 on that. Now eventually, obviously, over time they
6 reduced the carriage on the -- on the third, and I --
7 as I remember it, that was sort of a back and forth
8 from the City Council about what makes sense, because
9 there was a lot of duplication on the educational
10 side.

11 Q Well, even today, the system is carrying
12 WGBH and at least a part of its --

13 A A portion, yeah.

14 Q A portion.

15 A Yeah, I think what they did was to reduce
16 that carriage and -- and possibly to those things that
17 are unique at WGBH. As I remember it, WGBH, which
18 comes out of Boston, is -- is the source of about 40
19 percent of all of the original programming on PBS
20 nationally coming out of the PBS system. So it is,
21 arguably, the strongest PBS station in the country, so
22 it's a somewhat unique situation.

23 Q And so your point is that WGBH could be an
24 attractive distant signal as a source of PBS
25 programming?

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1 A Yeah.

2 Q And --

3 A If I were to choose a PBS station in the
4 country, you know, if you went all around the entire
5 country, I'd probably choose WGBH as the number one
6 PBS station.

7 ARBITRATOR WERTHEIM: Could you explain
8 how they came to carry WGBH partially, in view of the
9 -- at least it may be a defect in my understanding,
10 but my understanding is you either carry a channel or
11 you don't. You can't say we'll carry this part of it
12 but not the other part. Is there an exception for the
13 educational channels?

14 THE WITNESS: You --

15 BY MR. HESTER:

16 Q Can I help you out with the question and
17 see if I can --

18 A Yeah, go ahead.

19 Q -- your memory, and see if this accords
20 with your recollection.

21 This Westerly cable system encompasses a
22 number of different communities, is that right?

23 A Right.

24 Q And does the designation of a partial
25 distant signal mean that the distant signal is being

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1 carried in some of those communities but perhaps not
2 in all of those covered by the system?

3 A That could be. I'm not sure what this --
4 what the partial carriage, I think it was the "X" on
5 here, in --

6 Q Yes.

7 A Yeah. What that means in this cable data
8 rundown, as to whether it's part of the day for -- in
9 a multi-community system, only in some of those
10 communities. If I remember -- if I remember
11 correctly, the agreement that was -- was reached with
12 the City Council members was that part of the day
13 would actually be carried on this, and I think that
14 was with WGBH's agreement.

15 So it may be that there are ways to take
16 the general rules here and change them. If you went
17 to Ted Turner and said, "I want to do this with WTBS,"
18 or you went to Tribune and said, "I want to chop up
19 WGN," they would say no. I think in this particular
20 case there was a yes. That's my -- my memory, but
21 I've got to tell you I'm a little bit unclear on that.

22 Q So you don't remember specifically?

23 A I can't remember precisely. I just
24 remember that we had a channel capacity problem.
25 There were a lot of PBS's on. The management of the

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1 system said, "This doesn't make any sense, because
2 what we're doing is getting just too much of the same.
3 Let's get -- let's drop some PBS's." The City Council
4 said, "You can't drop WGBH."

5 Q Did the management, to your recollection,
6 want two PBS signals?

7 A The preference, typically, on cable system
8 management is to have one.

9 Q And are there --

10 A Given that there are a finite number of
11 channels they would like to have one PBS channel.

12 Q Are there also occasions when cable
13 systems carry one local and one distant signal PBS?

14 A That sometimes happens, sometimes happens.

15 Q And can that occur, for instance, in
16 circumstances where the local public television signal
17 has a different programming mix from the one that's
18 being imported on a distant basis?

19 A That would make it more sensible to do.

20 Q And are you aware of some occasions when
21 that has, in fact, happened in that way?

22 A I'm not -- I don't have things spring to
23 mind right now. I -- I know that it has happened that
24 way, yes.

25 Q Let me ask you, if you could, to look at

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1 Program Suppliers Exhibit 19-X.

2 A Which one is it, because I didn't --

3 Q That's the other one of these printouts.

4 A That's a New York system?

5 Q Yes, the New York system.

6 A All right.

7 Q And I wanted to direct your attention to
8 the page on Hyde Park.

9 A Okay.

10 Q Do you have that page?

11 A Yes, I do.

12 Q Now, this table up at the top again has
13 the designations for the different kinds of distant
14 signals. Do you see that?

15 A Yes, I do.

16 Q I think we can agree that there is one
17 error here. There is a listing for WNBC. That would
18 not be an educational station, would it?

19 A No, it sure wouldn't.

20 Q I could represent for the panel that
21 Mr. Lane and I had conferred off the record and
22 concluded that that must be a mistake. That's
23 obviously a network.

24 A That's the NBC affiliate from New York
25 City.

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1 Q So that should properly be changed to an
2 "N" I take it.

3 A Right.

4 Q Now, and do you see that there are two
5 other educational --

6 A I do.

7 Q And one is shown as a local signal, and
8 one is shown as a distant signal during the period '90
9 through '92, is that right?

10 A That's correct.

11 Q And to your recollection, was the Hyde
12 Park system operating at full channel capacity during
13 this period?

14 A I -- I can't remember, but I'm going to
15 guess that it was.

16 Q I can just help you out with that one, I
17 hope, if I direct you to Program Suppliers Exhibit 20-
18 X.

19 A That's to the extent that, once again,
20 that I -- that Program Suppliers exhibit is accurate,
21 because as I stated previously these are often
22 inaccurate.

23 Q Right.

24 A But I -- I -- these systems were older
25 systems. They had lesser channel capacity. I'm going

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1 to guess that they were upgraded to full capacity.

2 Q Okay. So that would be your general
3 recollection as to this Hyde Park system?

4 A Yes.

5 Q Okay.

6 ARBITRATOR WERTHEIM: They don't move Hyde
7 Park back and forth, further and inclusive to New York
8 City from year to year, do they?

9 THE WITNESS: Hyde Park?

10 ARBITRATOR WERTHEIM: Yes.

11 THE WITNESS: I don't think so.

12 ARBITRATOR WERTHEIM: How come it's local
13 some years and distant other years?

14 THE WITNESS: Well, that's -- that's a
15 very good question. It has to do with the changes in
16 the FCC definitions of the distances -- you know,
17 these concentric circles that are drawn around a
18 market and how far out it is, because the city stays
19 in the same place and the concentric circles move.

20 BY MR. HESTER:

21 Q And can there also be occasions when a
22 particular household might be able to pick up a signal
23 over the air with rabbit ears on their television
24 antenna, yet that signal might be treated as a distant
25 signal for these purposes?

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1 A That's possible. I mean, we really have
2 both situations, where someone might be able to pick
3 it up on rabbit ears, and it is treated as a distant
4 signal, and where it is relatively close to the
5 broadcasting transmitter and the city of origin, and
6 yet there is a mountain in the way and they can't pick
7 it up, and it's a local signal. I mean, so you get
8 those kinds of anomalies.

9 And it's interesting, you know, as we look
10 at the -- these situations or the cable systems here
11 that were put into -- into -- put in as exhibits,
12 these are a small part of our cable mix. Okay? And
13 they represent some anomalous situations.

14 In the vast majority of our cable systems
15 which are on the west coast of Florida, the east coast
16 of Florida, southern California, northern California,
17 Minnesota, you know, just to give you some of the
18 spread, we have more distant signals. We carry more
19 distant signals with these -- particularly these
20 superstations and the -- and the big sports
21 operations, because those markets work out a little
22 bit differently than these -- than these do.

23 I don't know why these were chosen. I
24 guess because maybe they didn't have as many distant
25 signals, but they're just a small part of -- of what

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1 we do, and they are different than the average, and I
2 would say from my experience in the average of what
3 cable systems look like, and certainly from the
4 average of Colony's system.

5 Q Thank you. Those are all the questions I
6 have.

7 A Okay. Thanks.

8 Not done yet?

9 CHAIRPERSON JIGANTI: Somebody else wants
10 to talk to you.

11 THE WITNESS: Okay.

12 CROSS EXAMINATION

13 BY MS. HAND:

14 Q Good afternoon, Mr. Myhren. I'm
15 Jacqueline Hand on behalf of the National Association
16 of Broadcasters, and we're here claiming for the
17 station-produced programs of U.S. commercial
18 television stations.

19 A Okay.

20 Q I just have a few questions for you. The
21 first one is I believe you stated both here today and
22 in your direct testimony that Providence Journal
23 Company owns 11 broadcast television stations, is --

24 A That's correct.

25 Q -- that correct?

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1 A Yeah.

2 Q Do you know, Mr. Myhren, is KING licensed
3 to Seattle, Washington, one of those broadcast
4 stations?

5 A Yes, it is. Yes, channel 5 Seattle. It's
6 an NBC affiliate.

7 Q Do you know, Mr. Myhren, whether KING
8 produces a local evening newscast?

9 A Yes, it does.

10 Q Does it also produce a number of other
11 news programs --

12 A Yes, it does.

13 Q -- within the station?

14 A And public affairs.

15 Q Do you know which cable systems carry KING
16 as a distant signal?

17 A I couldn't tell you precisely which ones
18 do. It's a very desirable signal.

19 Q Is it true that KING is carried by King
20 Video Cable Company to its Ellensburg, Washington,
21 system?

22 A Probably so.

23 Q Okay.

24 A Yeah.

25 Q At this time, Mr. Myhren, I'm going to

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1 hand you a two-page exhibit.

2 A Let me -- let me make a point here. When
3 we talk about network affiliate stations, as opposed
4 to the distant signals we've generally been talking
5 about, and I'm sure that will come up somewhere in the
6 -- in the proceedings, but just -- there really is a
7 different -- there are some different considerations
8 that one must go through when one brings a distant
9 signal in which is duplicative of another signal from
10 that same network into a -- when you come into a
11 market where the cable operator is also -- already
12 carrying, let's say, an NBC affiliation and now it
13 brings this one from a distance in, the network non-
14 duplication rules go into effect, which are not at all
15 at play on most of the distant signals we've been
16 talking about. Has that come up here at all?

17 Q What would you say that you, as a cable
18 system operator, you would evaluate the non-network
19 program on that distant signal? For example, you
20 would look at the KING.

21 A Yeah.

22 Q Non-network programming.

23 A Yeah.

24 Q Okay. At this time, I'd like to hand this
25 exhibit to you.

1 A Okay.

2 MS. HAND: And I'd like this to be marked
3 for identification as NAB 1990-1992 Exhibit 2-X.

4 (Whereupon, the above-referred
5 to document was marked as NAB
6 1990-1992 Exhibit No. 2-X for
7 identification.)

8 THE WITNESS: Thank you.

9 MS. HAND: I'd like you to look over that.

10 Mr. Chairman, I'd just like to clarify
11 that this exhibit is a portion, an excerpt from an
12 exhibit that has been submitted as part of NAB's
13 direct case, and Dr. Ducey will be testifying later
14 this week and will be the sponsoring witness for this
15 exhibit.

16 ARBITRATOR WERTHEIM: What's the exhibit
17 number in your direct case?

18 MS. HAND: It's Exhibit 12.

19 ARBITRATOR WERTHEIM: Thank you.

20 BY MS. HAND:

21 Q Now, I know you didn't put this exhibit
22 together, Mr. Myhren, so you may not understand what
23 many of these notations are. If you don't mind, I'll
24 just go through quickly and explain to you what it
25 means and have you accept, for purposes of my

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1 questions, that it's accurate.

2 A Okay.

3 Q This chart shows the distant signal
4 carriage of KOMO, and on the left-hand -- along the
5 left-hand margin I listed five cable system
6 communities that carry KOMO as a distant or partially
7 distant signal.

8 A Okay.

9 Q And underneath each community is listed
10 the other broadcast signals that are carried by that
11 system. Would you look through quickly and highlight
12 for yourself where KING is listed?

13 A Well, on here it's listed in Astoria,
14 Oregon.

15 Q Right.

16 A As a local signal.

17 Q Right. You're one step ahead of me.

18 A Okay.

19 Q The L, the dash L represents a local
20 signal. I'll just identify the dash NN is meant to
21 represent network and a network affiliate of NBC.

22 A Got you.

23 Q Seattle, Washington, obviously the
24 community of license, and dash L represents local.

25 A Okay. Then to answer your question, it's

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1 listed as a local signal in Astoria, Oregon, and it's
2 listed as a distant signal in the next four markets
3 that you have -- Ellensburg, Washington, which was one
4 of our cable systems; Longview, Washington; Moses
5 Lake, Washington; and Wenatchee, Washington.

6 Q Okay. Would you turn to the second page
7 of this exhibit?

8 And again, for clarification purposes,
9 this is taken from Exhibit 12 of Dr. Ducey's
10 testimony, and he will be appearing later this week to
11 sponsor this exhibit.

12 Are those four communities you just
13 mentioned identified on this map?

14 A I see them, yes.

15 Q Okay. Mr. Myhren, I have only one
16 question relating to this map. In the cable markets
17 around Seattle, and the ones I'm referring to would be
18 Wenatchee, Moses Lake, Ellensburg, and Longview, would
19 the news programs from KING and Seattle, Washington,
20 be of value to the cable operators in Wenatchee, Moses
21 Lake, Ellensburg, and Longview, and the cable
22 subscribers of those systems?

23 A Yes.

24 MS. HAND: Okay. At this time, I'd like
25 to distribute another exhibit, which for

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1 identification I'd like to have marked as NAB 1990-
2 1992 Exhibit 3-X.

3 (Whereupon, the above-referred
4 to document was marked as NAB
5 1990-1992 Exhibit No. 3-X for
6 identification.)

7 BY MS. HAND:

8 Q And I only have one copy of this, but I'd
9 like to hand it to the witness, with a complete copy
10 of the transcript that these pages are excerpted from.
11 And if you'd like to refer to this at any time, I just
12 want you to have that available.

13 Now, you testified earlier, didn't you,
14 Mr. Myhren, that King Video Cable Company is a cable
15 system owned by Providence Journal, is that right?

16 A It was owned until we made the sale to
17 Continental.

18 Q This past October?

19 A Very recent, right.

20 Q Okay. Are you aware that Edward Hewson,
21 the Regional Manager for King Video Cable, testified
22 in the 1980 proceeding?

23 A I wasn't aware. I know him, not
24 personally, but I was not aware that he had testified.

25 Q All right. Would you -- I apologize it's

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1 not in the pages that I've copied for you, but if you
2 would look at the original transcript that's on your
3 right there, and look at page 1849. I believe that
4 identifies this as being the testimony of Mr. Hewson,
5 and I'll hand out a copy, which if you would just
6 attach to the back of this exhibit so that there's no
7 misunderstanding about whose testimony this is. You
8 can verify that this is the testimony of Edward
9 Hewson?

10 A Yeah, this is the man I know.

11 Q Okay.

12 ARBITRATOR WERTHEIM: And what was his
13 position, sir?

14 THE WITNESS: He was -- was -- at this
15 point, it says Vice President of King Broadcasting
16 Company for Cable Television. That was what was
17 called King Video Cable. He basically ran King Video
18 Cable.

19 BY MS. HAND:

20 Q Mr. Myhren, would you turn to page 1860 of
21 the transcript?

22 A Okay.

23 Q And I'd like you to look down to line 13,
24 it's identified on the margin, and the sentence
25 starting with the word "but." Would you please read

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1 that until I ask you to stop? I'm sorry. Read that
2 out loud until I ask you to stop.

3 A Okay. "But in towns such as Ellensburg,
4 Washington, or Twin Falls, Idaho, the people in those
5 communities relate and want news and other things from
6 the more distant, larger markets."

7 Q Continue, please.

8 A "The people, for example, in Ellensburg,
9 Washington, which is about 120 miles east of Seattle,
10 over the mountains, that is a college community, about
11 8,000 students, a lot of professors, plus a farm
12 community, they receive the Yakima channels directly
13 via a translator, UHF, very small market. I think
14 Yakima is about 120th in the market." I think it must
15 mean the 120th market size or something.

16 "But they relate to Seattle. They shop in
17 Seattle. They consider the news and programming
18 available from Yakima to be, I suppose you would say,
19 hayseed.

20 Seattle is the 14th market. They want the
21 Sonics, they want Huskie football, they want to know
22 about Mariners' baseball, and that was the reason they
23 started the cable system initially."

24 Q Okay. That's enough. Thank you.

25 A Okay.

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1 Q Mr. Myhren, do you believe that is still
2 true today, that, for example, subscribers in
3 Ellensburg, Washington, would be interested in what is
4 happening in Seattle, Washington?

5 A I think that's true, yes.

6 Q Do you think that would have been true in
7 the period 1990 through 1992?

8 A Yes, I do.

9 MS. HAND: I just want to also clarify
10 that this portion of the transcript -- in fact, the
11 entire transcript of Mr. Hewson -- has been
12 incorporated into the record by designation and it is
13 direct case.

14 I have no further questions. Thank you,
15 Mr. Myhren.

16 ARBITRATOR FARMAKIDES: I have one
17 question --

18 THE WITNESS: Sure.

19 ARBITRATOR FARMAKIDES: -- before we move
20 on. You noted a little while ago that with respect to
21 one of your cable stations, cable networks, the local
22 cable --

23 THE WITNESS: Okay. We call that the
24 cable system.

25 ARBITRATOR FARMAKIDES: System.

1 THE WITNESS: Yeah, okay.

2 ARBITRATOR FARMAKIDES: Sorry. That, in
3 fact, it required -- the City Council in that
4 particular jurisdiction required you to continue to
5 carry a signal that it wanted dropped.

6 THE WITNESS: Right.

7 ARBITRATOR FARMAKIDES: I assume it wanted
8 to drop it because of programming reasons.

9 THE WITNESS: Right. It was duplicative
10 of other things that were on.

11 ARBITRATOR FARMAKIDES: Question, is this
12 where the City Council, the city utility, or the
13 regulatory authority requires cable systems to play or
14 not play certain signals?

15 THE WITNESS: Yeah. This has been -- this
16 has been a continuing battle in the cable industry
17 since its beginning, because, of course, cable is
18 municipally franchised. And it either gets a
19 franchise or -- the company either gets one from the
20 city, which is the City Council, or it doesn't, and
21 then the City Council gets certain swaying over what
22 happens with that system, and, in fact, I would -- I
23 would maintain often violates first amendment rights
24 of the cable operator in so doing -- another issue.
25 Maybe that is the core issue.

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1 But in any event, the -- the City Council
2 often has had rights, and these have varied as federal
3 legislation has changed over a period of time, to set
4 -- to set pricing for the cable operator.

5 ARBITRATOR FARMAKIDES: Does this have a
6 significant --

7 THE WITNESS: And that obviously has --
8 has an affect -- if the City Council says, "You know,
9 I'm going to set your pricing, and by the way, I'd
10 like you to carry this channel." The cable operator
11 has a different view than he might if he were making
12 that -- that decision in an open field.

13 ARBITRATOR FARMAKIDES: Does this have an
14 impact -- any kind of substantial impact on your
15 business?

16 THE WITNESS: I would say that municipal
17 regulation has a -- had a substantial negative impact
18 on the business, but I'm -- you know, I'm getting into
19 lobbying here. I --

20 ARBITRATOR FARMAKIDES: Does it have any
21 impact on your programming?

22 THE WITNESS: Yes. I think that -- that
23 -- that it has -- it has kept cable from doing, as it
24 has begun news channels locally, from doing some of
25 the hard-hitting -- hard-hitting local investigative

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1 reporting it might have done.

2 ARBITRATOR FARMAKIDES: Does it force you
3 to go into sports or into movies or into some other
4 arena that you would not otherwise go into?

5 THE WITNESS: Not typically. Not
6 typically, you know. It may force you to do
7 duplication as it did in this -- this one case. You
8 know, this wasn't a regulation in the case of
9 Westerly, which was the situation we were talking
10 about, the Westerly, Rhode Island system. It wasn't
11 pure written regulation. It was spoken suasion on the
12 part of the Council.

13 ARBITRATOR FARMAKIDES: Thank you.

14 ARBITRATOR WERTHEIM: If you'd turn to
15 page 3 of your testimony, the last full paragraph.

16 THE WITNESS: Page?

17 ARBITRATOR WERTHEIM: Page 3.

18 THE WITNESS: Of what?

19 ARBITRATOR WERTHEIM: I'm sorry. Page 4.

20 THE WITNESS: Of which -- which one?

21 ARBITRATOR WERTHEIM: Your testimony.

22 THE WITNESS: Oh, my testimony. Okay.

23 ARBITRATOR WERTHEIM: The last paragraph
24 says -- the first sentence, second half says, "The
25 decision to subscribe to cable tends to be made more

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1 by men than by women." What is the basis for that
2 statement?

3 THE WITNESS: Well, there has been
4 research done that has -- has shown that that decision
5 is more -- it's consumer research that has been done
6 that has been shown it's been more a male decision
7 than a female decision. Obviously, it can be made by
8 either. In some cases, it's made by the woman alone.
9 In other cases, it's a joint decision.

10 But -- but primarily, and I think the --
11 good grief, the last research I saw on this was maybe
12 1989, right about the beginning of this period, by
13 CTAM, did some research in which I think the
14 preponderance on this issue was maybe 57 percent male
15 decisionmaking and 39 percent, or some number female,
16 and the remainder don't know type of thing. It was
17 that kind of a difference.

18 ARBITRATOR WERTHEIM: Thank you.

19 CHAIRPERSON JIGANTI: I'm still not quite
20 certain how you pronounce your last name.

21 THE WITNESS: Marin (phonetic).

22 CHAIRPERSON JIGANTI: Marin (phonetic).
23 Okay.

24 THE WITNESS: Yes. It doesn't pronounce
25 like it spells.

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1 CHAIRPERSON JIGANTI: You said that as a
2 broadcast station, you wake up in the morning looking
3 at the Nielsens. You said as a system operator, they
4 mean nothing. Do you literally mean they don't mean
5 anything to the cable operator?

6 THE WITNESS: Well, we have to make this
7 distinction again between a cable operator and a cable
8 programmer. To a cable programmer, they can have some
9 significant importance, as what I said --

10 CHAIRPERSON JIGANTI: Well, the cable
11 programmers --

12 THE WITNESS: Right.

13 CHAIRPERSON JIGANTI: -- is what I'm
14 interested in.

15 THE WITNESS: Yeah. Well, as a cable
16 programmer, which we are with regard to Television
17 Food Network, or we will be with America's Health
18 Network --

19 CHAIRPERSON JIGANTI: Maybe I spoke too
20 quickly. I'm talking about cable system --

21 THE WITNESS: System operator.

22 CHAIRPERSON JIGANTI: Yes.

23 THE WITNESS: Okay. Yeah, that
24 terminology is really confusing to a lot of people.
25 The way we use it is -- is we say if you build the

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1 cable down the street, and bring in the programming
2 from whatever sources, do some of your own local
3 programming, and send the bills out to the customers,
4 you're a cable operator.

5 If you start up something called ESPN or
6 USA Network, and do all of the programming and put it
7 up in satellite and try to talk the cable operator
8 into buying it, then you're a cable programmer. So
9 you're saying --

10 CHAIRPERSON JIGANTI: Cable operator.

11 THE WITNESS: Okay.

12 CHAIRPERSON JIGANTI: Nielsen means
13 nothing to him, him or her?

14 THE WITNESS: I think it would be wrong to
15 say that for all cable operators it means nothing, but
16 it's -- it's really quite unimportant.

17 CHAIRPERSON JIGANTI: Where does the cable
18 operator get the information of what the people who
19 are in that district are interested in?

20 THE WITNESS: They do surveys with the
21 subscribers, or potential subscribers. They live in
22 the community, and they typically are talking to
23 people constantly about it. They get letters. So
24 there is a lot of local information about, you know,
25 what we'd like to have. They can also see whether

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1 additions of certain kinds of programming elsewhere
2 have increased subscriber roles.

3 Rather than looking at Nielsens, you know,
4 when the cable operator gets up in the morning the
5 cable operator says, "How many subscribers do I have?
6 Did I lose any? Did I gain any? And what do I have
7 to do to get more? And what do I have to do to keep
8 the ones I have?" That's really the question they
9 ask.

10 Now, if all of the programming that they
11 had on their cable system was unwatched by anyone,
12 they would clearly lose subscribers over a period of
13 time and then they'd have to say, "Gee, do I have the
14 right mix of programming?" But whether the Nielsens
15 bulk up to a large number on certain kinds of
16 programming it really isn't -- isn't -- that isn't
17 considered important by the cable operator.

18 CHAIRPERSON JIGANTI: So it's a question
19 of really not being considered important.

20 THE WITNESS: Right.

21 CHAIRPERSON JIGANTI: Not that there is no
22 value to it, but it just doesn't have any --

23 THE WITNESS: Yeah, I wouldn't say that
24 there's no value to the Nielsen numbers to a cable
25 operator. I would say this, though. Really, if

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1 you're in the business, you'll find that -- if I talk
2 to most people who operate cable systems at the local
3 level, who are the people who make the final program
4 decisions about Nielsens, their eyes sort of roll up.

5 I mean, they don't really understand them
6 completely, and they don't talk about them, and they
7 don't think about them. For someone at my level, they
8 become more important, because obviously I've got a
9 broadcast business over here, so I've come to
10 understand that the Nielsens clearly have a -- have a
11 -- have a place in the programming world. But in the
12 cable system world, they just don't mean much.

13 CHAIRPERSON JIGANTI: I believe you made
14 a statement that you would like to get rid of the
15 movies on the broadcast system as a distant signal,
16 and you would have sports, I gather, as the -- would
17 you want a 24-hour sports station?

18 THE WITNESS: Yeah. Well, of course, we
19 do have that with most -- almost every cable system
20 carries ESPN. But I would rather have something of a
21 perishable type there.

22 CHAIRPERSON JIGANTI: As a matter of 24-
23 hour programming, is there anything available?

24 THE WITNESS: Well, there wouldn't be.
25 You see, you wouldn't have -- that's why I said that's

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1 in the ideal -- in the ideal situation, because there
2 just aren't enough live sports events to cover all of
3 that. Yeah, you're right on that.

4 ARBITRATOR FARMAKIDES: Well, I took you
5 to mean that, really, if it was coming in on a distant
6 signal, you wouldn't have any chance for advertising.
7 So, therefore, that's a negative. Whereas, if it was
8 coming in on the locals, or some other network, you
9 would have the chance to advertise.

10 THE WITNESS: Well, that's generally true
11 of distant signals. No matter what type of
12 programming you're talking about on a distant signal,
13 the fact is that -- that you -- as a cable operator,
14 you look at the distant signal and you say, "Okay.
15 I'm going to pay something for that distant signal,"
16 and I have no advertising revenue generating
17 capability within that signal, because I can't change
18 anything on there. I can't take 30 seconds of
19 programming out or one of their ads out and put my ad
20 in. Can't do that.

21 Whereas on all of the other satellite
22 delivered, the ESPNs, the CNNs, the USA Networks, the
23 American Movie Classics, on all of those channels, I,
24 as a local cable operator, am given some spots where
25 I can insert my commercials. So I can make more money

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1 there.

2 Now, so I wouldn't really carry a distant
3 signal unless I thought there would -- because I'm
4 paying for the distant signal, I don't get any direct
5 revenue generating capability. The reason why I carry
6 it is because I say there is something on that distant
7 signal which is going to attract customers to my
8 system, and that's my other revenue stream. That's my
9 big revenue stream. You know, advertising is five
10 percent of my business. Customer subscriptions are 95
11 percent.

12 MS. HAND: Mr. Chairman, just so the
13 record is clear, I'd like to move to have NAB 1990-'92
14 Exhibits 2-X and 3-X admitted into evidence.

15 CHAIRPERSON JIGANTI: Any objections to
16 it? They will be admitted.

17 (Whereupon, the above-referred
18 to documents, previously marked
19 as NAB 1990-1992 Exhibits Nos.
20 2-X and 3-X for identification,
21 were received into evidence.)

22 Counsel, do you have any redirect
23 examination for the witness?

24 MR. GERSCH: Very briefly.

25 CHAIRPERSON JIGANTI: You may proceed.

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REDIRECT EXAMINATION

BY MR. GERSCH:

Q Do you still have the prepared testimony in front of you, Mr. Myhren?

A Yes.

Q I believe you had been asked a question about page 4 there, and just directing your attention to the second full paragraph beginning, "For our New England cable systems," I think you erred in your direct testimony about whether GN was carried in New England, is that right?

A I did.

Q But here it's correctly set forth that what you were carrying in New England was TBS, OR, and PIX, as well as some SBK, is that right?

A Yeah. We have WGN in so many of our systems across the country, but we do not have them in -- have it in New England, as the -- the written testimony shows.

Q Okay. Take a look at Program Suppliers Exhibit 19-X. That's the one that begins with Beacon system. I'm sorry. I'm looking at the wrong line. Take a look at 16-X, not 19-X, the one that --

A That's the other list of --

Q The New England stations, that's the New

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1 England systems.

2 A Okay. Okay. That distinction, by the
3 way, is systems is cable and stations are broadcasts.

4 CHAIRPERSON JIGANTI: Mr. Stewart advised
5 us of that about four days ago, and --

6 (Laughter.)

7 -- we've tried to adhere to it.

8 THE WITNESS: It's hard. It's hard to
9 keep track of.

10 BY MR. GERSCH:

11 Q And if you'll look at the last page of
12 that exhibit, the Westerly --

13 A Okay.

14 Q -- the Westerly system. Westerly carried
15 WOR, not just throughout the '90-'92 period, but
16 earlier and later than that, is that correct?

17 A That's correct.

18 Q And then if you turn back to the first
19 page, I believe Mr. Lane was questioning you about OR
20 carriage on Fall River, and he correctly pointed out
21 that WOR stopped carrying WOR in it looks like the
22 late '80s. I'm not sure I can get the exact date.

23 A Yeah, but we -- we picked up TBS at that
24 point, and -- when we dropped OR.

25 Q So this is --

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1 A I mean, it was not exactly coincident, but
2 that was -- that was -- in other words, what we did
3 was to pick up another superstation that had a lot of
4 sports on it. In fact, arguably more sports on TBS
5 than there was on OR.

6 Q So you replaced OR with TBS, and during
7 the same period you also carried PIX, is that correct?

8 A Right, and the Yankees.

9 Q Okay. Put that aside. If you'd take a
10 look at Program Suppliers Exhibit 18-X, which is the
11 Factbook. And take a look at the second page where,
12 again, I believe you were questioned about Fall River.
13 Up in that right-hand -- top right-hand column, they
14 talk about the programming received off air, and I
15 wonder if you take a look at that these list the
16 broadcast stations that presumably would have been
17 available on Fall River, if this is accurate. Do
18 these carry movies?

19 A Sure. If we go down from -- well, if you
20 go down from WBZ, WLVI, WJAR, WLNE, I mean, you can go
21 through a lot of -- they carry a lot of syndicated
22 programming, and they carry -- and they carry a lot of
23 movies.

24 Q And how about moving further down to where
25 they talk about the programming via satellite? Those

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1 are --

2 A Well --

3 Q Do those carry movies as well?

4 A Yeah. Yeah. Of course. They -- well,
5 let's -- let me look through here. Well, Family
6 Channel, for example, carries movies and syndicated
7 programming. Lifetime carries -- carries movies and
8 syndicated programming. TNT -- it's listed here as
9 Turner Network TV. USA Network. I mean, what they
10 are made up of primarily are syndicated shows and
11 movies.

12 Q And Nickelodeon, that would be -- that's
13 a lot of syndicated shows?

14 A Nickelodeon has some syndicated; they also
15 have some original stuff.

16 MR. GERSCH: No further questions.

17 CHAIRPERSON JIGANTI: Okay. Questions?
18 Any questions?

19 Okay. Mr. Myhren, you may have been
20 surprised a little while ago when we didn't have much
21 reaction to your testimony. We were concentrating
22 very diligently on your testimony.

23 THE WITNESS: All right.

24 CHAIRPERSON JIGANTI: As far as the
25 terminology, we even understood a term that you didn't

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1 use, and that was when you were offering advertising
2 from networks of systems, that those are called
3 avails.

4 (Laughter.)

5 THE WITNESS: Right.

6 CHAIRPERSON JIGANTI: Thank you,
7 Mr. Myhren.

8 THE WITNESS: Which is short for
9 availabilities.

10 (Laughter.)

11 CHAIRPERSON JIGANTI: Okay. You're
12 excused. Thank you very much.

13 THE WITNESS: Thank you.

14 (Whereupon, the witness was excused.)

15 CHAIRPERSON JIGANTI: Are you ready to
16 proceed with your next witness?

17 MR. GERSCH: Yes, we are.

18 CHAIRPERSON JIGANTI: Okay.

19 MR. GERSCH: Joint Sports Claimants call
20 Mr. James Mooney.

21 CHAIRPERSON JIGANTI: Mr. Mooney, would
22 you raise your right hand, please?
23 WHEREUPON,

24 JAMES P. MOONEY

25 was called as a witness by Counsel for the Joint

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1 Sports Claimants and, having been first duly sworn,
2 assumed the witness stand, was examined and testified
3 as follows:

4 CHAIRPERSON JIGANTI: Thank you. You may
5 be seated.

6 DIRECT EXAMINATION

7 BY MR. GERSCH:

8 Q Please state your name for the record.

9 A My name is James Mooney.

10 Q And, Mr. Mooney, from July of 1984 through
11 June of 1993, how were you employed?

12 A I was President and Chief Executive
13 Officer of the National Cable Television Association.

14 Q During the three years prior to July of
15 1984, how were you employed?

16 A I was the Chief Operating Officer of the
17 trade association.

18 Q Could you tell the panel what is the
19 National Cable Television Association?

20 A NCTA, as it is more broadly known, is the
21 principal trade association of the cable television
22 industry. During my time there, we represented about
23 3,000 of the 9,000 or so cable television systems in
24 the United States, but those 3,000 systems served
25 approximately 90 percent of the cable subscribers in

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1 the country. So we had pretty much all but the very
2 smallest of systems, and all of the big companies
3 known in industry parlance as MSOs or multiple system
4 operators.

5 NCTA was not then, and is not now, a full
6 service trade association in that it doesn't attempt
7 to help its members too much in the actual running of
8 their businesses, or try to help them with insurance
9 programs and things of that nature. It's pretty much,
10 I'd say, about 85 percent a public policy outfit,
11 responsible for the legislative and regulatory affairs
12 of the industry, with those other -- with only those
13 other activities as are -- bear some relationship to
14 the public policy aspects of the industry.

15 Q And you mentioned the makeup of cable
16 systems, operators of cable systems in the NCTA. Are
17 there also cable networks who are --

18 A Yes.

19 Q -- members of the NCTA?

20 A Yes, we represented I think all of the
21 nationally distributed cable networks, as well as some
22 of the regionally distributed networks as well, and
23 also had as associate members some of the
24 manufacturers of equipment.

25 Q What were your responsibilities when you

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1 were President and CEO of the NCTA?

2 A Well, we ran it pretty much like a
3 company. I had a Board of Directors who set policy
4 and who -- and met to do so four times a year. And in
5 addition to the board, there was also an Executive
6 Committee who -- who gave us policy guidance in the
7 intervals between board meetings.

8 But I had within my job description the
9 authority to carry out all of the executive functions,
10 including, the way the thing was structured, the
11 hiring and firing and compensation of employees, and,
12 in general, the day-to-day, week-to-week, and even
13 month-to-month decisions on who would do what in
14 furtherance of the policies established by the board.

15 Q Mr. Mooney, you are familiar with the
16 compulsory license and the fee that is charged for the
17 exercise of that license?

18 A NCTA -- the copyright issue is always with
19 us. It was the first issue I dealt with when I went
20 to NCTA, and it was still very much alive when I left.

21 Q Well, that was one of the questions I
22 wanted you to elaborate on. What is the basis of your
23 familiarity with the compulsory license and the
24 associated fee?

25 A Well, the compulsory license, from a

1 congressional perspective, was Congress' way out of a
2 problem that came to a head in 1976, where the cable
3 industry, which was still pretty much of a rural, and
4 at best suburban, phenomenon had as one of its most
5 common practices the retransmission of broadcast
6 signals, including distant signals.

7 And it performed a valuable function in
8 rural areas, particularly those that had no access to
9 television, either because of distance from places
10 where there were TV stations or because of topography
11 that intervened -- interfered with the signal, and I
12 think you heard Tryg Myhren talk about mountainous
13 terrain and how people who are in the business of
14 selling TVs had to figure out how to bring the signal
15 in so they could sell the TVs, and so that led them
16 into the cable business, and that's how the industry
17 started in the late '40s and early '50s.

18 But as cable began to -- to change from an
19 altogether rural phenomenon into only a semi-rural and
20 suburban phenomenon, it began to encounter resistance
21 from the broadcasting industry, which thought at that
22 time, with substantial FCC support, that broadcasting
23 was the chosen means of delivering television in the
24 United States, and that cable was an illegitimate form
25 of television, and then there were significant efforts

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1 made by the broadcasters to suppress the industry
2 through the use of the federal regulatory process.
3 And they were pretty successful at that through the
4 '60s and '70s.

5 There also arose, as a consequence of
6 cable becoming a more widespread phenomenon, some
7 unhappiness in the -- what we call the Hollywood
8 community, which means mostly the studios. That in
9 their judgment cable was using their product to its
10 profit without compensating them, and they resisted it
11 as well.

12 Most of the resistance of the Hollywood
13 community and the broadcasters took one of two forms,
14 either seeking to get the regulatory authorities of
15 the FCC to suppress the technology, or to seek
16 judicial relief for what were described as violations
17 of copyright. Twice the Supreme Court held that the
18 then in effect Copyright Act, I think of 1909 -- I'm
19 sure one of the lawyers in the room can correct me if
20 I'm wrong on that -- simply did not contemplate, and,
21 therefore, did not cover cable retransmissions of
22 broadcast signals, that this was something outside the
23 law and not protected by copyright.

24 Well, the Hollywood guys and the
25 broadcasters banged away at Congress, and to the

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1 sports guys I might add, and Congress long enough to
2 do something about this, to get Congress to sit up and
3 pay attention. And the cable guys banged away at
4 Congress from the other side saying, "You can't put us
5 out of business because this will make all of the
6 people we serve and bring TV to very unhappy."

7 And the result was the classic legislative
8 compromise, which -- in which Congress, in effect,
9 said, "You can continue to do what you're doing, but
10 henceforth, at least with respect to the distant
11 signals, you must pay royalty fees for the privilege,
12 which will be deposited into a fund and periodically
13 divvied up amongst the various claimants who show up
14 saying, 'We have a stake in this as owners.'"

15 Q And as time went on, I take it you were
16 personally involved in formulating the NCTA's position
17 with respect to --

18 A Well, immediately upon enactment of this
19 law, the people who had been against the cable systems
20 carrying out this activity began to try to agitate for
21 the actual appeal. And when I arrived on the scene,
22 which was the end of 1980, beginning of 1981, there
23 was already in full swing a move on the part of the
24 Hollywood broadcasting and sports industries to seek
25 the act's repeal. And I think hearings had already

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1 been -- hearings had been held before the House
2 Subcommittee on Intellectual Rights and Trademark as
3 early as 1979.

4 Q I just want to stay with your personal
5 familiarity of this subject before turning you over
6 for --

7 A The first thing I did when I --

8 Q Let me just --

9 A Yeah.

10 Q Let me just stick with your personal
11 familiarity before we tender you for questioning on
12 your qualifications to anyone who wants to ask. You
13 were involved in the interaction with the Congress
14 over whether the compulsory license should be
15 retained, is that right?

16 A Retained, repealed, or modified, yeah.

17 Q All of the above. Also, in terms of
18 negotiating with the various different elements of the
19 cable industry about what their positions ought to be
20 with respect to whether the compulsory license should
21 be maintained or repealed or --

22 A Well, consulting with the various
23 interests in the cable industry, yes, certainly.

24 MR. GERSCH: At this point, we would
25 tender Mr. Mooney for voir dire.

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1 CHAIRPERSON JIGANTI: Any questions of
2 Mr. Mooney?

3 Not hearing any questions, you may
4 proceed, counsel.

5 MR. GERSCH: Thank you.

6 BY MR. GERSCH:

7 Q Mr. Mooney, could you state what the
8 purpose of your testimony is here today?

9 A Oh, I think to establish, within the
10 context of my experience, what it is that cable
11 operators value about distant signals.

12 Q Okay. And could you summarize what that
13 opinion is?

14 A Historically?

15 Q If you could just keep it to a summary,
16 but short.

17 A I think at one point distant signals were
18 easily one of the most attractive things about cable
19 TV, because they either represented the operator
20 bringing TV to places where there was no TV, or
21 represented bringing more TV to places where there was
22 very little TV.

23 Until the FCC began to loosen up broadcast
24 licenses in the early 1980s, there were very few, if
25 any, independent television stations to be found

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1 outside the top 50 markets. There were affiliates of
2 the three networks, and that was it, which is
3 historically one of the reasons there are only three
4 networks.

5 Q Did there come a time when that changed?

6 A When the cable operators began to bring
7 distant signals to these places, it was quite popular
8 because it gave people options. But as the cable
9 industry grew, in -- both in terms of its geographic
10 ubiquity, but also in terms of its financial
11 wherewithal, and was able to amass its own program
12 resources, the role of distant signals were altered.

13 They became, in time, significantly less
14 valuable in the sense that they brought unique added
15 value to the cable service, because one of the things
16 that happened as the cable industry matured was that
17 there were launched lots of cable networks which sort
18 of looked and felt like independent broadcast stations
19 -- the USA Network, TNT, the Family Network, the
20 evening part of the Nickelodeon Network, and so forth
21 -- which had a pretty good, and indeed in some
22 respects superior, lineup of syndicated programs and
23 movies.

24 And where there had been a shortage of
25 this kind of programming previously, now there began

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1 to be a surfeit of it. And in my -- in my written
2 testimony, I -- I allude -- I illustrate to some
3 degree what kind of change has occurred and the degree
4 to which movies and syndicated programming are now
5 very plentiful on basic cable service, on that tier of
6 service which most people actually subscribe to, which
7 I've heard referred to here as expanded cable.

8 And certainly during the period that we're
9 discussing, virtually all cable subscribers subscribed
10 to the expanded basic rather than the so-called narrow
11 basic. If a system had more than five percent of its
12 subscribers take the narrow basic, it was cause for
13 comment in the industry. It was that rare.

14 But the one exception, of course, was --
15 was -- was and is major league sports. Distant
16 signals are still an extremely important, arguably the
17 most important source of out-of-market major league
18 games on cable, and the industry continues to prize
19 distant signals mostly, not entirely, but mostly for
20 that reason.

21 Q Before we get into sports, just so we can
22 perhaps touch on some of the things in your written
23 testimony, I believe you said that you illustrate --
24 but you were talking about in terms of the plentiful
25 nature of alternative programming. That's on page 5

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1 of your written testimony, is that right? Do you have
2 a copy of that there?

3 A Yes.

4 Q And that's that first full paragraph?

5 A Yes.

6 Q Which continues on to page 6?

7 A Yes.

8 Q And what is the point that you're making
9 there?

10 A Well, the point that I make there is that
11 distant signals at one time, prior to I'd say the --
12 the late 1980s, distant signals were an extremely
13 important source of movies, syndicated programming,
14 and sports, in the cable operator's service offering.
15 But that as time went on, distant signals became less
16 important, certainly with respect to movies and
17 syndicated programs, because you had so many other
18 sources of syndicated programs.

19 I should add not only on the cable
20 networks, which play a very important role here -- in
21 fact, in recent -- since about 1988, even outbidding
22 some of the -- some of the broadcasters for national
23 distribution rights to very popular programs like
24 Murder, She Wrote, but also as a result of the
25 proliferation of independent stations beyond the first

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1 50 markets.

2 I think it's important not to
3 underestimate that as an important factor in the
4 relative diminution of the previous special role
5 played by superstations and distant signals in
6 general.

7 Q And as this -- these additional sources of
8 programming became available to the additional --
9 these cable networks, what happened to the
10 superstations, in your opinion, during this period of
11 time?

12 A What happened to them?

13 Q How did the availability of these
14 additional sources of programming affect the
15 superstations?

16 A Well, it has made it more competitive. I
17 think that --

18 CHAIRPERSON JIGANTI: Excuse me. What was
19 your question?

20 MR. GERSCH: My question was -- Mr. Mooney
21 had been describing --

22 CHAIRPERSON JIGANTI: Just ask your
23 question. I don't think I understood it.

24 MR. GERSCH: Certainly.

25 BY MR. GERSCH:

1 Q As these additional sources of cable
2 programming came into being, the cable networks you
3 were referring to, how did that affect the
4 superstations? And I'm referring to the types of
5 things you discuss on pages 6 and 7 of your -- going
6 into 7 of your testimony.

7 A I think that with respect to those
8 superstations which historically had claimed to be
9 unwilling superstations, and as a practical matter
10 that means everybody other than WTBS, they discarded
11 the cloak of unwillingness and became rather avid
12 seekers of carriage on cable systems across the
13 country, as well as openly competing for the
14 affections of the cable industry and trying to market
15 their signal in such a way as to ensure continued
16 carriage.

17 Q Okay. Let's go to the middle of page 7 of
18 your prepared testimony where you talk about the
19 controversy over the compulsory license.

20 CHAIRPERSON JIGANTI: Excuse me. Maybe
21 before you get into that, we could take our break.

22 MR. GERSCH: Sure.

23 CHAIRPERSON JIGANTI: We'll resume again
24 in 10 minutes.

25 (Whereupon, the proceedings were off the

1 record from 2:14 p.m. until 2:27 p.m.)

2 CHAIRPERSON JIGANTI: You may proceed when
3 you're ready, Mr. Gersch.

4 DIRECT EXAMINATION (continued)

5 BY MR. GERSCH:

6 Q Okay, directing your attention to page
7 seven of your testimony -- prepared testimony, Mr.
8 Mooney, you discuss here the controversy over
9 compulsory license. Could you please explain why the
10 compulsory license has been controversial?

11 A It has been the source of a great deal of
12 unhappiness in the broadcasting industry.
13 Broadcasters have felt, whether correctly or not, that
14 cable uses its own -- the broadcast signals to compete
15 against other broadcasters, and they resented that.
16 It has no been the only source of unhappiness within
17 the broadcasting industry directed at cable.

18 I think one of the things that makes
19 broadcasters, of course, some of them unhappy is there
20 mere existence of cable television. As I've suggested
21 before, some broadcasters see it as an illegitimate
22 media. But in any event, it has been something about
23 which broadcasters could crystallize their resentment
24 of cable.

25 It moreover has been the glue which on and

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1 off, over the past -- I'd say from about 1978 through
2 the early 90's, it has been the glue which has held
3 broadcasting and parts of Hollywood together in an on
4 again, off again, anti-cable political alliance. Much
5 of the commentary I have to give you about this
6 involves politics rather than strictly substance.

7 It involves how these industries war with
8 each other in Washington and in Congress and at the
9 regulatory agencies and how through a good deal of
10 that time interests which have their own reasons to be
11 at odd with each other, and that certainly includes
12 Hollywood and the broadcasting industry, and to some
13 extent, major league sports and the broadcasting
14 industry.

15 Nonetheless, we'd find ability frequently
16 to unite together and to go hand in hand up to the
17 Hill and complain about the cable industry to
18 Congress, and this created an environment that was
19 difficult for us in ways that went beyond the simple
20 merits of the dispute that was dividing cable from
21 these industries because it created a climate in some
22 corners that was unfavorable to us and would tend to
23 wash over into other issues.

24 If you believe, as was eventually the
25 anti-cable battle cry, that cable is an unregulated

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1 monopoly, abusive of its customers and some of the
2 political system, including that part of it which
3 results in compulsory licensing, then your resentment,
4 of course, does not stop there; it goes onto other
5 things as well.

6 And this was a problem for us. Probably
7 more of a problem for us in terms of the political PR
8 that was in terms of the actual probability the
9 license would be repealed.

10 ARBITRATOR WERTHEIM: With all those
11 millions and millions and millions of subscribers all
12 over the country, isn't that a pretty strong
13 constituency for the cable industry? They all vote --
14 or a lot of them.

15 THE WITNESS: I think it was the cable
16 industry's misfortune in the late 80's particularly to
17 get on the wrong side of a lot of the subscribers
18 through its pricing and services policies. But
19 subscribers tend not to organize politically in
20 Washington. Well, there's no -- there are the so-
21 called consumer organizations, but there's no national
22 association of cable subscribers.

23 There are, however, some extremely
24 skillful and well heeled lobbies representing
25 commercial interests which had reason to, you know,

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1 contest our modestly skilled but way equally well
2 heeled lobby activities, and it was a big problem for
3 us.

4 BY MR. GERSCH:

5 Q You mentioned the joint opposition to the
6 compulsory license. That included the sports leagues
7 as well, is that correct?

8 A Very much so, yes.

9 Q Okay. And I believe you mention in your
10 prepared testimony some of the actions taken by the
11 agencies, and particularly the FCC, in response to
12 some of that pressure. What were those types of
13 things?

14 A The FCC, in 1988, reimposed the so-called
15 syndicated exclusivity rules, or a variant of the
16 syndicated exclusivity rules. Syndicated exclusivity
17 was a federal regulation in place roughly between 1972
18 and 1980 promulgated by the FCC which gave a local --
19 which, in general terms, gave a local broadcaster the
20 right to require the local cable operator to delete
21 from a distant signal a series or program to which the
22 local broadcaster had bought the local rights.

23 So again, to over simplify, if the local
24 broadcaster had the rights to I Love Lucy, and I Love
25 Lucy was on a distant signal, the cable operator was

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1 bringing in -- the broadcaster had the right to
2 require the cable operator to blank out I Love Lucy.

3 CHAIRPERSON JIGANTI: Was that at any time
4 or only concurrent times?

5 THE WITNESS: To tell you the truth, I
6 don't remember what the old rule was. I suspect it
7 was at any time, or certainly within the same day
8 part. After 1988, when the rule was promulgated again
9 -- put back into force, or a variant of it put back
10 into force, it was at any time.

11 ARBITRATOR WERTHEIM: At any time, did you
12 say?

13 THE WITNESS: Yes. If you had the rights,
14 you had the rights.

15 ARBITRATOR WERTHEIM: For some specified
16 duration of time?

17 THE WITNESS: For some -- for whatever his
18 contract with the owner of I Love Lucy gave him the
19 rights for. He had to prove exclusivity, but that of
20 course began to be included in these contracts pretty
21 much.

22 CHAIRPERSON JIGANTI: So in a typical
23 situation, the owner of copyrighted work and I Love
24 Lucy would negotiate with WGN, give them the exclusive
25 on it?

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1 THE WITNESS: What happened with the super
2 stations was that -- I guess one of the unintended
3 consequences of the reimposed Syndex rules is that it
4 sort of drove out of the closet, as it were, those
5 syndicators who really thought that compulsory license
6 wasn't that bad.

7 And also, it drove out of the closet the
8 feelings of the people who owned WGN and WOR and so
9 forth that they really did like being a super station.
10 And they bought national rights, which had the effect
11 of preventing -- I mean, the owner of I Love Lucy in
12 that event would have effectively given up the right
13 to sell exclusivity against that signal to any local
14 broadcaster.

15 So the super stations got national
16 clearance for their entire program schedules. Now,
17 that was not true -- tended not to be true of
18 regionally distributed broadcast signals. There were
19 a lot of Syndex claims made against those signals by
20 local broadcasters who had bought the rights to
21 programs on regional signals.

22 CHAIRPERSON JIGANTI: Could you give us an
23 example of the typical situation that you're talking
24 about now?

25 THE WITNESS: Sure. Let me construct a

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1 hypothetical situation and let's say with I Love Lucy,
2 which may be owned by Viacom, I'm not sure. But
3 whoever it's owned by would sell the -- sell rights to
4 WGN to show I Love Lucy. Now, the owner of I Love
5 Lucy is fully aware that WGN is a super station up on
6 a satellite with its signal retransmitted by cable
7 systems all over the country.

8 And in this instance, subsequent to the
9 reissuance of the Syndex rules, that sale of I Love
10 Lucy would have come with contractual provisions which
11 guaranteed WGN that no other buyer of I Love Lucy
12 throughout the country would have in his contract
13 whatever exclusivity the FCC required for the local
14 guy to assert exclusivity against the WGN signal.

15 So, WGN would have what we call national
16 clearance for that program. However, a channel 20
17 here in Washington is retransmitted throughout
18 southern Virginia and the Carolinas by cable systems
19 as a regional broadcast signal of regional interest
20 because they had some sports package. I don't
21 remember what it was, but it doesn't matter.

22 Channel 20 is what we call a regional
23 distant signal. And if channel 20 were to have bought
24 I Love Lucy and the cable system in Roanoke was
25 running channel 20 as a distant signal, it is highly

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1 unlikely that whatever rights channel 20 had would
2 have prevented the local "indie," independent
3 broadcast station, in Roanoke who also had bought I
4 Love Lucy from a Syndex rights -- that kind of Syndex
5 did work.

6 CHAIRPERSON JIGANTI: Who would be
7 forbidden to broadcast?

8 THE WITNESS: Who would be forbidden to
9 broadcast?

10 CHAIRPERSON JIGANTI: Yes, channel 20 or
11 the --

12 THE WITNESS: Channel 20 because it's the
13 out of market station.

14 CHAIRPERSON JIGANTI: Oh, I see.

15 ARBITRATOR WERTHEIM: So you're saying the
16 local Roanoke station would have been able to buy
17 channel 20 from --

18 THE WITNESS: Assuming that his contract
19 had whatever magic words the FCC had established as
20 necessary to invoke its Syndex rights under the rule,
21 yes.

22 CHAIRPERSON JIGANTI: Now, would there, in
23 typical situations, vast majority of situations, if we
24 can characterize it that way, who would be the
25 purchasers national -- would it be the super stations?

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1 THE WITNESS: It would be the super
2 stations or the cable networks.

3 CHAIRPERSON JIGANTI: Or the cable
4 network?

5 THE WITNESS: Like USA, TNT. In other
6 words, the non-broadcast -- the cable networks
7 distributed for sole use by cable television systems.
8 People who don't operate over the air TV stations
9 anywhere but simply have a feed that they put up on
10 the satellite which is beamed down to cable system
11 affiliates throughout the country and distributed
12 through cable systems.

13 Syndex is a sort of communications act
14 device employed by the FCC to get around the full
15 operation of the compulsory license. It is a
16 limitation. It is a communications act limitation on
17 the use of the compulsory license with respect to
18 distant signals.

19 And what happened then is industry
20 practice came on on top of that and said we'll just
21 sell these guys national clearance rights outright.

22 ARBITRATOR FARMAKIDES: So you're saying,
23 as I understand you, and I think what bothers you here
24 is because you're interfering with the contractual
25 relationship -- what you're saying here is that I Love

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1 Lucy was sold to WGN knowing full well it's going to
2 go throughout the system.

3 Okay, I Love Lucy was also sold to channel
4 20 with the clear intent that channel 20 was going to
5 show that -- broadcast that signal in its local
6 market. And then you're saying that because a
7 Virginia station that's importing the distant signal
8 which shows I Love Lucy, that they can prevent 20 from
9 showing the I Love Lucy, is that what you're saying?

10 THE WITNESS: In Roanoke.

11 ARBITRATOR FARMAKIDES: Oh, Roanoke, okay.

12 THE WITNESS: Yeah, in Roanoke. And it's
13 actually not 20 who would be showing it.

14 ARBITRATOR FARMAKIDES: Okay.

15 THE WITNESS: It would be the cable
16 operator.

17 ARBITRATOR FARMAKIDES: So it would be
18 imported?

19 THE WITNESS: It would be imported, that's
20 right, yeah.

21 ARBITRATOR FARMAKIDES: Gotcha. That's
22 clear.

23 THE WITNESS: And what's --

24 ARBITRATOR WERTHEIM: But who is it in
25 Roanoke that can -- that's got to be someone else

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1 who's brought it --

2 THE WITNESS: Whoever's got a local
3 broadcast station down there who's bought local
4 rights. And again, who's used whatever, you know,
5 form the FCC has established.

6 ARBITRATOR WERTHEIM: That Roanoke channel
7 then -- station, rather, could not bought WGN
8 directly, but it could bought channel 20 which is
9 picking up WGN, is that what you're saying?

10 THE WITNESS: Probably, yes. Yes, I think
11 that's legally correct. Although it's I Love Lucy
12 that we're interested in here. It's not the total --
13 WGN only owns the transmission rights to I Love Lucy.
14 It doesn't own I Love Lucy. I Love Lucy, per se, is
15 owned by, you know, whoever in Hollywood owns it.

16 ARBITRATOR WERTHEIM: But if WGN had the
17 non-exclusive national clearance, some other local
18 station that has local exclusive rights would not be
19 able to block Lucy on WGN but it could block Lucy on
20 some other channel that was retransmitting WGN, is
21 that what you're saying?

22 THE WITNESS: Yes, I think that's probably
23 right. It all depends what everybody's contract says.
24 So what this has done is reelevate contract law to
25 pretty much the arbiter of who's got exclusivity for

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1 what. And the reason you've got a FCC rule is you've
2 got to have some thing with the force of law to
3 overcome what would otherwise be the total right of
4 the cable operator to take down that signal which
5 arises out of the Copyright Act.

6 And you have to overcome the Copyright
7 Act, at least partially, somehow. And that's what
8 Syndex does. And then the industries have come on on
9 top of that with their contractual provisions to sort
10 of overcome a little bit of that too.

11 ARBITRATOR FARMAKIDES: Let me proceed a
12 little bit further. Assuming you have I Love Lucy
13 being sold for transmission purposes to WGN. WGN then
14 transmits it throughout its system. However, the
15 people that own I Love Lucy also contract separately
16 with a vast majority of the audience of WGN to show I
17 Love Lucy in their local stations, okay?

18 Does that impact on the value of I Love
19 Lucy to WGN, and who would --

20 THE WITNESS: Sure.

21 ARBITRATOR FARMAKIDES: And who would
22 determine that, the contract?

23 THE WITNESS: The contract, yes. It
24 technically -- well, --

25 ARBITRATOR FARMAKIDES: Would they pass

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1 that on to their other stations that in fact are
2 picking up the signal?

3 THE WITNESS: Would they pass it on what?

4 ARBITRATOR FARMAKIDES: Would WGN pass on
5 the lower cost?

6 THE WITNESS: Oh, no.

7 ARBITRATOR FARMAKIDES: No?

8 THE WITNESS: Because see, WGN technically
9 isn't the seller of the signal. The seller of the
10 signal is the satellite company that -- and
11 distributes it. If WGN's contract says that the
12 seller of I Love Lucy -- the original owner of I Love
13 Lucy will not contract with any other broadcaster in
14 the United States in a way that allows that
15 broadcaster to assert exclusivity against WGN's I Love
16 Lucy, then WGN has what are known as national
17 clearance rights.

18 If WGN's contract doesn't say that, and
19 whoever owns I Love Lucy contracts with the guy who
20 owns the Roanoke station that gives him exclusivity
21 against all comers in Roanoke, then he can assert
22 Syndex against the Roanoke cable operator, taking down
23 I Love Lucy as part of the WGN signal.

24 This a little like unraveling a pole of
25 spaghetti, I know, but it's what happens when you've

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1 got a policy that nobody wants to repeal but everybody
2 wants to --

3 ARBITRATOR WERTHEIM: Now are you telling
4 us the super stations are the only ones with the
5 leverage to get that kind of deal?

6 THE WITNESS: Pretty much so, yeah. Not
7 100% so, but yes, that's the overall -- super
8 stations, of course, are paying a premium price too.

9 CHAIRPERSON JIGANTI: Now in the
10 illustration you used at one time, you used broadcast
11 station 20, is that correct?

12 THE WITNESS: Yes. The only reason I used
13 20 was because it was the -- it came first to mind as
14 an example of a broadcast station in this market, an
15 "indie," an independent, that does happen to be a
16 regional distant signal going down the Atlantic coast
17 through Virginia and the Carolinas.

18 ARBITRATOR WERTHEIM: I used to be able to
19 get the Orioles on channel 20, but I can't any longer.
20 I don't know why.

21 (Laughter.)

22 THE WITNESS: Well, that might be how they
23 got to the originally distributed signal. They had a
24 package that people thought attractive.

25 BY MR. GERSCH:

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1 Q And just to clarify one other point about
2 Syndex, Mr. Mooney. You say those -- that the FCC
3 reinstituted Syndex or repromulgated it in 1988.
4 Those rules didn't go into effect until 1990, is that
5 correct?

6 A That's correct.

7 Q Okay. If you can turn to page nine then
8 of your testimony. On page nine through page 13, you
9 attribute the survival of the compulsory license which
10 you described as a political albatross for the
11 industry peculiarly to sports. Could you explain the
12 basis of your opinion in that regard?

13 A Sure. One of the things that I did as --
14 when I was in NCTA was obviously to try to provide
15 advice to my members as to what public policy
16 strategies would be likely to lend -- likely to
17 minimize the kind of difficulty they would encounter
18 in Washington. And if you are a semi-regulated
19 industry that competes with other semi-regulated
20 industries who are adept at using the regulatory
21 process to try to enhance their standing vis-a-vis
22 competitors, you've always got trouble.

23 Moreover, if you are an industry like the
24 cable industry, which is -- was until the late 1980's
25 primarily a construction industry rather than a

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1 service industry, you probably annoyed a lot of people
2 with your merchandising and service policies, quite
3 frankly -- cable industry's pricing and service
4 policies annoyed a lot of people into the early
5 1990's.

6 And that caused a lot of political trouble
7 in Washington too. Finally, you had other nascent
8 industries coming on who wanted to get a piece of what
9 cable had. And what cable had done essentially was to
10 invent the subscription television business on a large
11 scale -- but who wanted to use the legislative and
12 regulatory process to ease their own entry into that
13 business now that cable had shown, contrary to the
14 expectations of many smart people in the 1970's that
15 people would pay for television.

16 And that caused a lot of trouble. So one
17 of the things I was always looking to do was shorten
18 my lines, to use a military metaphor, and to reduce
19 the amount of round I had to defend. And then one of
20 the questions which arose nationally in the policy
21 councils of the industry is do we need to keep the
22 compulsory license given that we now have so much of
23 our -- in the way of our own programming resources and
24 our own networks, and given the fact that it's such a
25 political headache for us.

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1 The sports people have always been very
2 well represented in Washington, and team owners tend
3 to be politically consequential with members of
4 Congress from their areas. It is in the nature of
5 politicians and owners of major league teams somehow
6 to have an affinity with each other, or at least
7 seemingly so.

8 Broadcasters are -- have an enormous
9 amount of latent political authority in this country
10 because they by and large still control the means by
11 which politicians communicate to their constituencies.
12 And I know that when I was a staff aide to a member of
13 Congress, the first thing he did when he went home for
14 the weekend to his district was to go out and make the
15 circuit of the TV stations and do a stand up
16 interview.

17 And every one -- every other of his 434
18 colleagues in the House would do the same thing. And
19 if the TV station was hostile for some reason, that
20 was a problem for him. So it would have been
21 imprudent to under estimate the political authority or
22 at least the latent political authority of
23 broadcasters.

24 And finally, Hollywood people are
25 themselves a very well organized group in terms of

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1 relationships with the political community, and in the
2 person of Jack Valenti, have one of the most effective
3 advocates for an industry in the United States. And
4 I didn't need Jack after me all the time.

5 So all of those were motivations to see
6 what we could do about shortening the lines by
7 eliminating the compulsory license or at least
8 modifying it in such a way as to eliminate the
9 political controversy that seemed inevitably to
10 accompany it.

11 And for a period of a couple of years, we
12 went through a pretty serious analysis which at times
13 included direct negotiations with especially the
14 Hollywood guys as to what could be done here. And in
15 the end, we kept running up against sports and the
16 inability of my constituents to see how they were
17 going to get past that problem with their subscribers
18 because it would create a lot of trouble, it was felt,
19 in the subscriber base if they didn't have it -- if
20 they no longer have access to the sports, the
21 professional major league sports that were
22 characteristic especially of the super stations.

23 And to a lesser extent, and to a much more
24 sporadic extent, we had some problems with broadcast
25 news in core cities. Although, I had only a small

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1 number of my major companies that were concerned about
2 that.

3 CHAIRPERSON JIGANTI: Typically who is in
4 favor of eliminating compulsory licenses?

5 THE WITNESS: Within my industry or --

6 CHAIRPERSON JIGANTI: Actually, both --
7 anyone.

8 THE WITNESS: Well, programmers would --
9 the cable networks would have loved to see the
10 compulsory license go because -- for distant signals.
11 There is also a compulsory license for local signals
12 which doesn't figure much into this controversy. The
13 cable program networks would have been very happy to
14 see the compulsory license for distant signals go away
15 because of the distant signals which they were very
16 properly, as their competitors, would go away from
17 cable systems too.

18 WGN would return to the status of a local
19 Chicago TV station and no longer be selling national
20 advertising in competition with the USA network. And
21 that would make the people at the USA network very
22 happy. I think that a lot of my more politically
23 sophisticated CEO's of cable operating companies would
24 have been happy to see the compulsory license for
25 distant signals go away too because they were worried

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1 about the stability of their assets.

2 They were worried about the stability of

3 --

4 ARBITRATOR WERTHEIM: Who does the "they"
5 refer to?

6 THE WITNESS: The chief executive officers
7 of major cable companies. They were worried about
8 what happened to the value of their assets if the
9 government didn't eventually come along and because of
10 some general politic unhappiness with the cable
11 industry do things that would really hurt us, which
12 eventually happened.

13 And I think that Ted Turner openly, and
14 the proprietors of the other super stations less
15 openly, would have been unhappy too because they would
16 have lost what amounted to national networks. WGN and
17 its owners, you know, were of course quite worried
18 that they were nationally distributed and the
19 advantage of that up to the nth degree when made up
20 their rate card for advertising and when they decided
21 who to go out and market their ad slots to.

22 And the people who bought that time
23 understood that they were paying national money for
24 national exposure.

25 BY MR. GERSCH:

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1 Q Mr. Mooney, if I could just clarify. The
2 first set of groups you were mentioning, the cable
3 networks that were part of the NCTA, and I think what
4 you referred to as some of the more sophisticated
5 CEO's of the cable companies, those were folks within
6 the NCTA umbrella that you were citing as examples of
7 people who would have been happy to have the
8 compulsory license disappear, is that correct?

9 A Yes.

10 Q And then Turner and WG, they were examples
11 of people who you would say wanted it to stay, is that
12 correct?

13 A Yes, although Turner was a member of my
14 organization, but WGN was not.

15 CHAIRPERSON JIGANTI: You said in favor of
16 elimination. You said cable companies.

17 MR. GERSCH: I took you to mean cable --
18 operators of cable systems, the MSO's -- is that who
19 you're referring to?

20 THE WITNESS: Yes. I'm sorry, that's --
21 in the lexicon of our business, cable companies, the
22 people who are called cable operators are cable
23 operators and the programmers are programmers. And
24 to the outside world, I know that it's all one big --

25 ARBITRATOR WERTHEIM: Was there anyone

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1 other than the super stations that were interested in
2 keeping compulsory licenses?

3 THE WITNESS: Sure, the smaller cable
4 operators were, especially those companies that were
5 run by old timers in the business. Companies that
6 still had a strong entrepreneurial culture in the
7 sense that they were still run by the guy who founded
8 them back in 1947 and who made his business pretty
9 much through the importation of distant signals and
10 who had -- and who, at a time when there was very
11 little money in the cable industry, helped to finance
12 lawsuits ultimately resolved in the Supreme Court
13 asserting the cable operators' right to retransmit
14 broadcast signals, and many who have come to believe
15 that there was a kind of divine right to retransmit
16 broadcast signals and to attempt in any way to
17 interfere with -- was sacrilegious, at least.

18 BY MR. GERSCH:

19 Q And you've been describing sort of the
20 line of who was for and who was against within the
21 cable industry community. There have been, I believe
22 -- Judge Jiganti may have broadened this question at
23 the end and said anywhere, who was opposed and who was
24 in favor.

25 Going beyond the cable industry now -- for

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1 example, sports, movies -- what was their position on
2 the compulsory license?

3 A The movie guys were pretty much against it
4 and wanted to see it repealed unless they were in
5 their -- unless they could see some business advantage
6 in not having it repealed. And some of them used to
7 go back and forth on this. There were some mixed
8 feelings within the Hollywood community about this and
9 within companies within the Hollywood community
10 especially as the copyright pool grew larger and began
11 to take on the character of serious money.

12 Similarly, there were divisions within the
13 broadcasting industry about the license in part
14 because broadcast station owners whose signals were
15 being distributed beyond their market of license by
16 cable operators frequently were able to profit from
17 that in terms of their ad sales, but also because
18 there was a significant amount of cross ownership
19 between broadcasting and cable companies.

20 And sometimes you'd see one company with
21 forces on both sides of the issue.

22 CHAIRPERSON JIGANTI: Now why would the
23 movie industry be in favor of elimination?

24 THE WITNESS: The traditional position of
25 the movie industry, which is, for these purposes, also

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1 the syndication industry -- they tend to be pretty
2 much the same companies -- is that if you don't pay us
3 for it directly, you're stealing it. And their
4 traditional first encounter especially with new media
5 that employ their product in some way that does not
6 involve a direct transaction with them is to strongly
7 oppose the new media and try to kill it, as they at
8 one point tried to do with cable industry and as at
9 one point they tried to do with the VCR industry in
10 the Betamax case when Hollywood essentially sought to
11 have the courts declare it to be a violation of the
12 Copyright Act for video retailers to rent tapes out to
13 individuals and not give a portion of each sale back
14 to the original creator of the tape.

15 ARBITRATOR FARMAKIDES: You know, I saw
16 that in legislative history somewhere where really one
17 of the underlying reasons for the compulsory licensing
18 was the practicality aspects of this thing. How in
19 the world do you change? Now, let me ask you, please.
20 If there were no compulsory licensing, what would be
21 your alternative? How would you achieve a fair
22 distribution of the market value of these products in
23 the market?

24 THE WITNESS: Well, back then it
25 couldn't, in the 60's and 70's.

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1 ARBITRATOR FARMAKIDES: I'm talking about
2 now more recently, especially with the computer
3 systems advancing to the point where they are, why
4 couldn't you do that today?

5 THE WITNESS: What you need -- I mean,
6 you've got in a typical -- I almost say broadcast day,
7 because that's what we say in the television business.
8 In a typical TV day on a channel that's programmed all
9 day, you have got hundreds and maybe even thousands of
10 different sets of rights involved.

11 And within programs, you have rights
12 belonging to different people. Sometimes one guy
13 doesn't own all the rights to, let's say -- to pick on
14 I Love Lucy again. I mean, as --

15 ARBITRATOR WERTHEIM: If they have to work
16 that out for network broadcasting, why is this so much
17 --

18 THE WITNESS: I'm getting to that. I'm
19 getting to that. What you need to work this out is
20 somebody with -- is somebody to have sufficient money,
21 organizational sophistication, and guaranteed
22 distribution to be able to work it out and line up a
23 whole day. And that's what we call networks. That's
24 what NBS is, that's what CBS is, and that's what ABC
25 is. And today, that's what USA Cable Network is and

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1 TNT and the Family Channel and all of those things.

2 But it took awhile for the cable industry
3 to get to a point where it had the financial and other
4 wherewithal to be able to have networks that were
5 strictly devoted to it.

6 ARBITRATOR WERTHEIM: -- some of the super
7 stations. At least they're also like networks.

8 THE WITNESS: Sure they are. Of course
9 they are. That is what they are. They are networks.
10 They are staffed like networks, they think like
11 networks.

12 ARBITRATOR WERTHEIM: So why would you
13 assume that TBS and WGN, for example, would go back to
14 being local broadcast -- simply negotiate and Turner
15 would be left hand negotiate with his right hand and
16 go for the Braves, you know -- create the same thing
17 like a price structure.

18 THE WITNESS: They might do that. I've
19 heard talk from time to time that one or another of
20 them is contemplating doing just that. They are, to
21 some degree, also constrained in what they can do by,
22 you know -- under the Copyright Act. I mean, they may
23 find it in their advantage to allow cable operators to
24 start inserting ads in their signals.

25 And on the other hand, exact a payment

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1 direct from the cable operator to them. But they
2 can't do that under the current system.

3 ARBITRATOR FARMAKIDES: Let's assume that
4 they're all very knowledgeable of the Copyright Act
5 and they fully intend to honor it, and they fully
6 intend to comply with it. In that circumstance --

7 THE WITNESS: I do assume that.

8 ARBITRATOR FARMAKIDES: You have to assume
9 that. Assume now then that -- how would the networks,
10 the very large networks, how can they value the
11 various properties which they include in their
12 network?

13 THE WITNESS: Probably the same -- much
14 the same way. These people are all in the network
15 business. They all derive much of their revenue -- in
16 the case of broadcasters, all of it from advertising.
17 And they're organized as a business to do it that way.
18 Now, the cable networks are organized somewhat
19 differently. Cable networks derive a substantial
20 portion of their revenues, I think still, in most
21 instances -- the majority of their revenues not from
22 advertising, but from fees paid to them directly by
23 the cable operators, affiliation fees.

24 Which is the -- and from that fact, flow
25 most of the significant business differences between

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1 the cable and broadcasting businesses. And that is
2 why you can have cable networks that are devoted to
3 niche interests. That's why you can have a food
4 network like Tryg Myhren was talking about this
5 morning.

6 That's why you could have a golf network
7 which has been launched. That's why you could have
8 supposedly coming on line the first quarter of 1996 a
9 hobby/crafts network, because it's not dependent on
10 solely or even mostly on mass market advertising to
11 drive its economics.

12 ARBITRATOR FARMAKIDES: Like Court TV?

13 THE WITNESS: Yeah, like Court TV.
14 Exactly like Court TV. If Court TV had to survive on
15 advertising, it would be dead tomorrow morning because
16 there just isn't enough there to carry it. And that
17 too is why, you know, we don't pay much attention to
18 -- in the cable business -- especially on the operator
19 side, we don't pay much attention to Nielsons.

20 I mean, I don't think I know a cable
21 operator who subscribes to the Nielsons. I know,
22 because I tried to get some once. It is subscription
23 television, and the economics of that are radically
24 different from a media that's driven 100% by
25 advertising.

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1 ARBITRATOR WERTHEIM: Well now, if we
2 didn't have compulsory licenses, the cable operators
3 would have to negotiate with someone to get rates to
4 put -- to have the diversity of programming they want.

5 THE WITNESS: Which they do.

6 ARBITRATOR WERTHEIM: How would that
7 differ from the negotiations they now have with the
8 cable networks?

9 THE WITNESS: Well, it wouldn't. That's
10 what they would do. That is the being they would
11 negotiate with, cable networks.

12 ARBITRATOR WERTHEIM: And the owners of
13 these various rates would negotiate with the cable
14 networks for program packages?

15 THE WITNESS: Exactly. That's what
16 networks do. They are packagers of rights.

17 ARBITRATOR WERTHEIM: And they do that
18 now.

19 THE WITNESS: Yes, they do. They do that
20 now. They didn't do that when the compulsory license
21 was an entity because they weren't around or were
22 around only in the form of a show. They didn't have
23 any money. The compulsory license, with respect to
24 distant signals, is something of an anachronism. I
25 can say that. I don't get paid to defend it anymore.

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1 But I think you've also got -- you have to
2 understand that these discussions seem a little
3 abstruse to some guy who's sitting out in Des Moines,
4 who when he comes home after working in the plant,
5 just wants to watch the Cubs game. And he doesn't --
6 he not only does not understand how the desire to
7 straighten a regulatory line, so to speak, might
8 justly -- might be described as justly stopping the
9 Cubs games from being brought in there against the
10 Cubs' will or whatever, but he isn't interested in
11 listening.

12 He doesn't want to. All he wants to see
13 is that game. And if there is any interruption in his
14 ability to see that game, he's going to complain to
15 his congressman. And that happens a lot. And the
16 nature of elected officials is such that -- take the
17 path of least resistance, and if you can work it out
18 -- especially if you can work it out with the affected
19 industries, all of whom have other interests pending
20 before the Congress at any given time, you work it out
21 without having to go tell the guy in Des Moines that
22 you're sorry, but he can't have the Cubs game anymore.

23 ARBITRATOR WERTHEIM: Well, how likely is
24 it that someone would have to tell him that? There
25 would have to be plenty of cable systems in Des Moines

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1 just ready to jump in and negotiate either with the
2 Cubs or major league baseball or call up Mr. Garrett
3 and say who do I talk to.

4 THE WITNESS: Well, perhaps so. Major
5 league baseball would have to speak for the -- I'm not
6 an intimate in the internal --

7 ARBITRATOR WERTHEIM: Everybody's ready to
8 make a deal if there's money in it for them.

9 THE WITNESS: From what little I
10 understand of the sports business, that would be
11 easier -- that might be easier said than done because
12 sports, after all -- major league sports is organized
13 around a franchising system where teams have
14 ascertainable, you know, geographic areas. And
15 that's, I guess, for good and sufficient reason.

16 But again, I'm not expert on that and I
17 shouldn't attempt to comment on it.

18 ARBITRATOR FARMAKIDES: Of course, we have
19 a responsibility which is extremely -- for us,
20 extremely serious. No reason for our justification
21 and we're thinking in terms of how do we find the
22 value of these products. We hear on the one side the
23 measuring systems of Nielson and the measuring system
24 of Bortz, and you talked to us about the constant sum
25 technique, if you will, or the measuring technique.

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1 Well, how do we focus on really -- what is
2 the best way of measuring value in this -- in your
3 business or this industry?

4 THE WITNESS: I think you have to ask
5 value to whom. If it's value to the cable operator,
6 --

7 ARBITRATOR FARMAKIDES: Forgive me. I
8 should have said for service.

9 THE WITNESS: Okay.

10 ARBITRATOR FARMAKIDES: You have a
11 responsibility to provide service to the community at
12 large for service.

13 THE WITNESS: I think that -- again, the
14 cable operators really don't care that much about
15 Nielsons. I mean, they have to care in the sense that
16 you don't have a business unless your customers are
17 gaining satisfaction from their monthly investment in
18 cable, which must mean that they're watching it and
19 that there is something in it that they find to like.

20 But theoretically, the cable business
21 could work if nobody watched anything, so long as
22 people paid that monthly subscription bill. And so
23 long as they kept paying the bill, that would be okay
24 because in the cable business, revenue doesn't depend
25 on viewership. In the broadcasting business, revenue

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1 depends 100% on viewership, and they count it into
2 decimal points when deciding the ad rate that the
3 station is able to get in its marketplace and when
4 counting up what ABC, NBC and etc. are able to get for
5 national ads.

6 And what you do in the cable business
7 instead is you try to maximize penetration. Now,
8 until -- I'd say about 1985, average penetration of
9 cable systems in the United States was about 55 or
10 56%. That means 55 or 56% of the homes that could
11 subscribe to cable did, but that 45 or 46% of homes
12 that could subscribe did not.

13 What are you going to do to get the other
14 45 or 46%, understanding that with 55, 56, you've
15 probably made your -- okay, you've probably gone to
16 black ink somewhere around 50% penetration as an
17 industry average. You've got a system like Fairfax
18 County, you never hit the black ink.

19 The industry average is about 50%.
20 Penetration above that level tends to be marginal --
21 goes pretty much to the bottom line because the
22 incremental cost of serving additional subscribers are
23 not that great. So you have a terrific incentive to
24 try to up that penetration rate as much as you can.

25 And the thinking in the industry since the

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1 mid 1980's when marketing really began to take hold as
2 a serious enterprise was you go after it in chunks --
3 after it in pieces. You try to appeal to the discreet
4 tastes among the population that are capable of being
5 addressed through the television network, and then you
6 go after the people who like to watch golf, and who
7 want to watch cooking shows, or who want to watch
8 sporting events.

9 You've got to protect the sporting
10 population because they, according to the common
11 wisdom in the industry, supported by marketing surveys
12 of companies and industry organizations, the sports
13 fan has always been the single largest group of cable
14 subscribers. We used to call them truck chasers,
15 because when a franchise was let in an area, the joke
16 was that when the cable truck came down the street,
17 people would chase it wanting to subscribe even before
18 the wire was laid.

19 But when you're at 50%, 55% of
20 penetration, you've got all the truck chasers. So
21 after that, it gets harder. And that's why you start
22 to see more niche channels. Always understanding you
23 have to protect your base. That may be more of an
24 answer than you wanted, but it's important to
25 understand how much this business is different from

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1 broadcasting.

2 BY MR. GERSCH:

3 Q Let me just turn your attention to a
4 couple more things in your prepared testimony, and
5 then we'll conclude. If you look at page ten, bottom
6 of that first full paragraph, you say had Turner --
7 well, just to paraphrase, you say that had Turner not
8 had the Braves and Hawks, it's unlikely that WTBS ever
9 would have gone beyond being a regional signal on
10 cable systems.

11 Why do you say that?

12 A Well, I think it represented a judgement
13 on his part, as well as to a significant degree
14 judgement by the cable industry because -- get
15 carriage -- that sports, major league sports, was an
16 important and indeed indispensable part of his line up
17 if he was going to succeed as a nationally distributed
18 super station.

19 I mean, otherwise why devote -- why should
20 he go to the trouble of trying to achieve that end,
21 and otherwise, why should cable operators give him
22 channel space, which was even more scarce then than it
23 is now? What was the added value? His thing was --
24 unless it had some big, you know, impressive thing.

25 And the quickest way to get that is

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1 sports, major league baseball and basketball.

2 Q Turning again to another part of your
3 testimony, you mention the fellow in Iowa who might
4 want to watch baseball, the Cubs. You reference in
5 your prepared testimony again in certain -- what you
6 describe -- I think it's either legendary or
7 celebrated instances in which people did attempt to
8 drop WGN, including efforts in Fairfax County.

9 What happened there?

10 A They put them back on. The cable operator
11 decided that discretion was the better part invalid
12 and he put it back on so as to extinguish what was
13 rapidly becoming a real problem for him with the
14 public, with the very vocal part of the public out
15 there, and with the local government.

16 Q And the protest was about losing the Cubs
17 games, is that right?

18 A About losing the Cubs games, yeah. That's
19 an example I give. I mean, I've had other experiences
20 where members of Congress would come to me and say,
21 you know, why are the -- so and so in my district, one
22 of my people are writing letters to me demanding that
23 I do something.

24 Q These are sports examples?

25 A Yeah, they're all major league sports.

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1 Mostly baseball. No member of Congress ever came to
2 me and said they're mad because they lost I Love Lucy.

3 Q Going back to the --

4 A The total is major league sports, most
5 frequently baseball.

6 Q Going back to the example of WGN and the
7 effort by Media General in Fairfax to drop it. In
8 your opinion, had the Cubs fans not protested, what
9 was Media General going to do? What did they say they
10 were going to do?

11 A Drop it. They were anxious to get rid of
12 the channel. I think. That was not a channel
13 capacity issue as it was an expense issue. That might
14 have been a 3.75 signal. I'm not sure of that, but it
15 might have been.

16 MR. GERSCH: We have no further questions
17 at this time.

18 CHAIRPERSON JIGANTI: At this time, it
19 would be a convenient time to take a recess.

20 (Whereupon, the proceedings went off the
21 record from 3:20 p.m. until 3:35 p.m.)

22 CHAIRPERSON JIGANTI: Who will proceed
23 first with the questioning?

24 CROSS EXAMINATION

25 BY MR. LANE:

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1 Q For the record, I'm Dennis Lane appearing
2 on behalf of Program Suppliers. Mr. Mooney, on page
3 three of your testimony, the first line on that page,
4 you refer to the political consequences of supporting
5 the compulsory license, do you see that?

6 A Page three?

7 Q Yes, the first line at the top of the
8 page.

9 A No. I have cable television began to take
10 its modern form in the late 1970's.

11 ARBITRATOR WERTHEIM: It's the sentence
12 that carries over from the previous page.

13 MR. LANE: I think you have a different
14 version from mine.

15 THE WITNESS: This must be off a different
16 word processor. The previous sentence. Yeah, okay.

17 MR. GERSCH: You didn't give him the right
18 copy.

19 THE WITNESS: I have the disadvantage of
20 reading --

21 MR. LANE: We received the unedited
22 version.

23 MR. GERSCH: It's just the format.

24 BY MR. LANE:

25 Q Okay, now do you see that on the first

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1 line of page three?

2 A Yes.

3 Q What did you mean -- how would you define
4 the political consequences?

5 A Well, as I said, it I think initially
6 energized the -- see, this comment is made within the
7 context of the fact that in 1992 Congress enacted over
8 President Bush's veto a bill of which subjected cable
9 television to not only to reregulation in an economic
10 sense, it referred by the press as reregulation, and
11 we referred to it that way ourselves.

12 But also, in many respects, a much broader
13 form of regulation than that which had been in effect
14 before, including new forms of regulation. And I see
15 that as the product of a number of things, one of
16 which was the fact that a political coalition was made
17 against us consisting of, in addition to others, the
18 broadcast -- and a substantial part of the Hollywood
19 community.

20 And for a good part of the period between
21 1984 when Congress established its original policy
22 respecting cable television and 1992 when it enacted
23 what we regarded as an onerous statute, through a good
24 part of that period, the broadcasting industries and
25 the Hollywood people were attacking us based on their

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1 resentment of the compulsory licensing system.

2 So it created a lot of problems for us,
3 which I think we would have been well to do without.
4 It provided us -- it stimulated a broader problem for
5 us. And I wish it --

6 Q So is it your testimony that if there had
7 been no compulsory license, the 1992 act would have
8 never come into place?

9 A It's conceivable. It is not my testimony
10 that had there been no compulsory license it would not
11 have come into play. You can't make absolute
12 statements of that kind with respect to subjects such
13 as these, but I think it's conceivable it wouldn't
14 have -- would have happened. We might have dodged the
15 bullet.

16 We might not have had the broadcasters out
17 against us as vigorously as they eventually were and
18 might have gained the additional vote in the Senate
19 that would have been required to sustain the
20 President's veto. Every little bit counts.

21 Q I want to go back to the Syndex situation
22 just to see if we could try to discuss that a little
23 bit.

24 A Sure.

25 Q For Syndex protection to work, you need a

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1 minimum of three players, right? You need the distant
2 signal, you need a local station, and you need a local
3 cable system.

4 A You'll have to describe to me what is
5 meant by "for Syndex to work." For it to work in what
6 respect?

7 Q Okay, for someone to ask for protection
8 and get it, there has to be those three players, do
9 there not?

10 A No.

11 Q No?

12 A There only has to be the -- there only has
13 to be the -- well, there have to be a different set of
14 players. There have to be -- the guy who owns and is
15 selling the program; the local broadcaster and the
16 cable operator.

17 Q Okay. All right, but the guy who's
18 selling it has sold it to someone -- has sold the
19 program to someone and it has -- that signal carrying
20 that programming has to be then broadcast or
21 retransmitted into a market where there's a local
22 station that owns the rights to the same program, is
23 that not right?

24 A Or for the occasion to assert Syndex to
25 arise, there must be some event which effectively

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1 challenges and attempts to defeat the local
2 broadcaster's exclusivity rights.

3 Q Right.

4 A Yes.

5 Q And that's done by a distant signal coming
6 in with the program that the local broadcaster has the
7 exclusive rights in?

8 A That is one of the ways it could arise.

9 Q Right. And when you were talking about
10 WDCA, channel 20, coming into Virginia -- let's just
11 say a lower Virginia market where the same program is
12 on -- let's just take that as a hypothetical. If the
13 local station wanted to assert its Syndex rights, it
14 would assert them against the local cable system in
15 that Virginia town, correct?

16 A Assuming that it has contractual rights to
17 assert.

18 Q Let's make all those assumptions just to
19 make this simple.

20 A I don't mean to quibble with you, but as
21 a practical matter, in the real world, sometimes --
22 lots of times, they've sold the Syndex rights, and
23 lots of times they've withheld them.

24 Q I understand that. We're just -- we're
25 trying to have a simple example here.

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1 A All right.

2 Q So in that situation, only the local cable
3 system in that Virginia town or whatever, market,
4 would be blacked out from that program?

5 A Would have to delete that program, yes.

6 Q Right.

7 CHAIRPERSON JIGANTI: From "that program,"
8 you're meaning the program --

9 MR. LANE: From WDCA, channel 20, that's
10 being imported. That's the same program that the
11 local station carries, isn't that right?

12 THE WITNESS: In this example.

13 BY MR. LANE:

14 Q In this example. And let's say right next
15 to that there was another market that had another --
16 a different local station in a different cable system,
17 okay. And that local broadcaster did not assert the
18 right against the cable system. In that market, the
19 cable system could carry the program from channel 20,
20 correct?

21 A Assuming that -- yes. Assuming he could
22 acquire it otherwise with the compulsory license.

23 Q Right. So that you're not -- when you're
24 blacking out, you're not -- the local station isn't
25 calling up WDCA, channel 20, and saying okay, you have

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1 to black out that program. It's calling up the local
2 cable system and saying you have to black out that
3 program, isn't that roughly how the rules work?

4 A Yeah, the rule was created for the benefit
5 of the local broadcaster.

6 Q Right. But it works on a market by market
7 basis where the cable system is located, not where
8 the signal originated?

9 A That's right.

10 Q I want to turn to page five and six of
11 your testimony if we could. On those two pages, you
12 talk about the amounts of programming in 1995 that
13 were available in the Washington, D.C. cable system.
14 Do you see that?

15 A Yes.

16 Q Did you -- do you know whether this 1995
17 programming availability matched that that was
18 available in 1990 to '92?

19 A My belief is that there would be no
20 significant difference.

21 Q And what is that based on?

22 A That's based on my understanding and
23 experience with the industry -- my understanding of
24 what the program line up on DC Cablevision was during
25 the years 1990 through 1992.

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1 Q When you refer at the bottom of page five
2 -- I'm sorry.

3 A I should tell you that the reason I picked
4 July 16, 1995 is that happened to be the week I wrote
5 my testimony --

6 Q I had a feeling of that.

7 A -- for which I had the Post TV Guide.

8 Q What time period were you looking at when
9 you did this? What time period during the day?

10 A Pretty much prime time.

11 Q Prime time?

12 A Yeah. A little bit of fringe. Mostly --
13 but not only in the event of a program the bulk of
14 which carried over into prime time.

15 Q Okay, could you just explain what you mean
16 by the term fringe in terms of hours, and also by what
17 you mean by the term prime time?

18 A In the television business, and these are
19 for the most part broadcasting terms, the day is
20 divided into different day parts, and that's how they
21 sell advertising. Sell it in the morning, sell it in
22 the afternoon, which morning goes up to noon, I think
23 -- afternoon.

24 There's early morning, morning. Then
25 afternoon goes to about 4:00, I think. You begin to

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1 get into what's called fringe, which according to who
2 you're talking to, will go to either 7:00 p.m. or 8:00
3 p.m. Some people also designate a period between 7:00
4 to 8:00 p.m. differently because under FCC rules the
5 broadcast -- the nationally distributed broadcast nets
6 aren't permitted to program during that time.

7 It's the -- call it the prime time access
8 rules. Technically, prime time, but one to which the
9 national networks have no access. And then you get
10 into prime time, per se, which is the period between
11 8:00 p.m. and 11:00 p.m.; and which is understood in
12 the television business, both broadcast and cable, to
13 be the most desirable part of the day for displaying
14 advertising because that's when you get the audiences
15 who do most of the buying of goods and services.

16 Q Now as I understand your numbers here on
17 these two pages, at the top of page six, you talk
18 about 5.5 hours per evening on the local independent
19 broadcast stations. Do you see that?

20 A Yes.

21 Q Is that 5.5 hours in total or 5.5 hours
22 each?

23 A 5.5 hours total per evening. If you took
24 the syndicated programs that were displayed on the
25 local independents during that week, you get an

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1 average of 14.6 hours on the cable networks and then
2 5.5 hours on the local independent broadcast stations.
3 Just add up the syndicated programs each evening to
4 get a seven day total, and divide them by seven.

5 And you get 5.5 hours of -- you know, I
6 Love Lucy, whatever they bought in syndication.

7 Q Now, did you include super stations as a
8 network in this analysis?

9 A I would have included them -- no, I did
10 not include them. I don't believe I did include super
11 stations. I included only the cable networks.

12 Q Do you believe that the D.C. market is
13 comparable to most markets in the country in the
14 amount of programming available?

15 A Yes.

16 Q How many markets have three independents?

17 A These days? A lot.

18 Q No, in 1990 to '92.

19 A In 1990 to -- a lot.

20 Q A lot.

21 A Most of the new stations -- there's very
22 little new station construction that's gone on in the
23 last few years. Most of the new station construction
24 occurred during the 1980's. So by 1990, they would
25 have been --

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1 Q Why did you pick these eight networks that
2 you include in here?

3 A Because they seemed to me to be cable
4 networks which are most directly comparable to
5 independent TV stations in terms of the program
6 scheduling they maintain. I was trying as much as I
7 could to do apples to apples. They are programmed in
8 large part pretty much like an independent broadcast
9 station.

10 Q And you concluded from this analysis that
11 the unique role once played by super stations in these
12 program categories is now a matter of history?

13 A It's not quite right. It has been my
14 understanding and my feeling and my belief as a result
15 of the time I have spent in the industry that the role
16 played by super stations in cable programming is for
17 the most part contributed to uniqueness, except in
18 sports -- a matter of history.

19 And I did this analysis to illustrate that
20 belief. But I did not derive that analysis -- that
21 belief from this analysis. I mean, everybody in the
22 cable industry kind of knows this. And I think it
23 would be wrong for me to intimate or testify that I
24 discovered something.

25 Q Could you turn to pages ten and 11 of your

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1 testimony? And this is where you compare the amount
2 of sports programming on DC Cablevision for the same
3 week, I take it?

4 A Yes.

5 Q Now during that period, do you know
6 whether the -- referring to the top line of page 11,
7 did the Orioles play more than five games?

8 A I don't know. I don't know if baseball
9 teams do typically play more than five games a week.

10 Q Okay. Did you count Home Team Sports in
11 this analysis?

12 A Yes, I do. This is one of the markets
13 where Home Team Sports is available as a basic
14 service.

15 Q Now as I calculate this, if you assume
16 three hours for a game, that's about roughly 45 hours
17 of baseball was available in that week. You had 15
18 games over the seven day period. Do you see that?

19 A Yes.

20 Q And do you know, is three hours roughly
21 about the length of a baseball game?

22 A I really don't -- two and a half, three.
23 It's never occurred to me frankly to calculate it.

24 Q It's 45 hours. That's six and a half
25 hours per day of baseball, isn't it, over the seven

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1 day period?

2 A That's the way the arithmetic works out.
3 I don't know though that all of the 45 hours occurred
4 sequentially. Probably a lot of it was running
5 concurrently.

6 Q Just as the syndicated series and the
7 movies during the same week were running concurrently,
8 right?

9 A Yes.

10 Q Did you limit yourself to the same hours
11 that you looked at the syndicated series and movies
12 for this analysis?

13 A I don't recall. I might not have.

14 Q Okay. Now during this period without the
15 super stations, there were eight games on in seven
16 days according to your testimony, is that correct?

17 A That's what it works out to, yes.

18 Q And what do you mean in the third line on
19 page 11 that super stations quite clearly fulfill a
20 radically more important role on the D.C. cable system
21 than the one they now claim other program categories?

22 A Well, I meant that seven out of -- I was
23 stating that in my judgement, seven out of 15 games
24 being on the super stations represented a much more
25 important role for the super stations who are making

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1 baseball available to the population of the District
2 of Columbia than was the case with respect to
3 syndicated programming and movies.

4 I think that if the syndicated programming
5 and movies available on super stations would have
6 disappeared that week, the impact on the subscribers
7 would not have been that great. But the impact on the
8 baseball fans would have been significant.

9 Q So instead of watching more than one game
10 a day, which would be what you can see without the
11 super stations eight games in seven days, you could
12 watch two games a day?

13 A Well, again, I don't know that -- whether
14 these games occurred back to back. I do know that
15 sports fans tend to regard their interest in sports
16 somewhat differently than do people who watch movies
17 and syndicated programs as their favorite genre of
18 television entertainment.

19 There are -- people don't go around with
20 Murphy Brown on a hat, but they go around with Cubs
21 and Yankees. And people tend to identify personally
22 with their favorite sports teams in a way that they do
23 not identify personally with a TV program. They may
24 like the TV program and they may describe it as one of
25 their favorite programs and try to be home when it

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1 comes on so they can see it, but they don't consider
2 -- normally consider their regard for that program as
3 part of their persona.

4 But in sports, it's different. And in my
5 opinion, seven out of 15 -- you know, when you take
6 eight games and increase them by seven to 15, you are
7 almost doubling the availability of games in that
8 sport to that population during that week, and that's
9 a lot. And proportionately, it is a whole lot more,
10 just in terms of bulk, than would be the case if you
11 did the same analysis with respect to either
12 syndicated programs or movies.

13 Q But you didn't do the same analysis for s
14 syndicated programs and movies, did you?

15 A No.

16 Q You didn't give us any information about
17 super station carriage during that week, did you?

18 A I don't believe I did.

19 Q Well, I don't want you to believe. I want
20 you to look at your testimony and tell us whether you
21 did or you didn't.

22 A Well, Counselor, without the book in front
23 of me, I can't tell you exactly if I did or not, but
24 I can supply it.

25 Q Well, I asked you this question

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1 previously, Mr. Mooney, so -- you told me then that
2 you hadn't included the super stations, that's why I'm
3 being a little bit testy about this, because I asked
4 the question before. You told me no, and now you're
5 telling me maybe.

6 A Look, I haven't been a -- in this fight,
7 so I will refrain from being testy in return. My
8 recollection is, and I should have said if I did not,
9 is that I don't think I did. But I don't remember
10 exactly.

11 Q Okay. But if you --

12 A I did this in July.

13 Q That's fine. If you did, you didn't break
14 out the super stations for a separate sentence in your
15 testimony as you did for the sports programs, is that
16 fair to say?

17 A I did not break out the super stations
18 versus syndicated programs and movies as I did with
19 sports.

20 Q So it might have been that -- I'm sorry.

21 A -- baseball.

22 Q So it might have been that the super
23 stations would have doubled the amount of syndicated
24 programs available during that week just as it did for
25 baseball, right?

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1 A Not unless they found a way to make the
2 prime time schedule hold more than three and a half or
3 four hours because there aren't that many of them.
4 Mathematically, that would not be a possibility. And
5 you'd have to start out by subtracting what you
6 suggested over three hours per baseball game from the
7 super station schedule, because they couldn't run a
8 game and a syndicated program simultaneously.

9 Q How would you weigh the relative value of
10 sports and other programming during the evening if I'm
11 viewing and say I'm watching a game and they are
12 changing pitchers so I watch a movie for a while.
13 Then the inning ends, so I watch a series. How would
14 you make that kind of a judgement?

15 A I care most as a cable operator, I care
16 most about your continuing to write that monthly check
17 out to me. I'm not much interested, quite frankly, in
18 how you divide your viewing hours between the
19 different types of programming.

20 Q Turning to -- I want to go back to page
21 six of your testimony, if you will. You discuss in
22 the first full paragraph there the term carriage
23 incentive. It is almost right in the middle of the
24 page. Do you see that?

25 A Yes.

1 Q What do you mean by carriage incentives?

2 A By carriage incentives, I mean things
3 offered by the programming network to the cable
4 operator to incent the cable operator to carry the
5 signal of that network. It is whatever competitive
6 devices are used by cable network to say, you know, in
7 addition to the merits of whatever it is the
8 programming consists of, carry me not him. You know,
9 you've only got one channel, for example.

10 Q Now is this an incentive that would lower
11 the per subscriber cost of the license fee, the stated
12 license fee to the operator?

13 A Some incentives have that effect, yes,
14 could have that effect. Most incentives I think are
15 most effective when they result ultimately in some
16 economic effect. It could be a discount on the
17 licensing fee. It could be a greater number than
18 customary of local avails. In a few recent instances,
19 it even seems to be direct cash payments.

20 Q You refer at the top of page seven to the
21 fact that I guess it's distant signals aren't -- I'm
22 not sure. Is this the common carrier or the distant
23 signal that can not offer add avails?

24 A The carrier. Neither. Neither, as I
25 understand the Copyright Act. Certainly the -- I

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1 don't know that the carrier would be in a position to
2 offer add avails.

3 MR. LANE: At this time, Mr. Chairman, I'd
4 like to introduce as Exhibit 21-X a copy of an ad for
5 CableVision Magazine, May 4, 1992. The cover page has
6 Mr. Myhren's picture on it.

7 CHAIRPERSON JIGANTI: What number is this?

8 MR. LANE: It's 21, sir.

9 CHAIRPERSON JIGANTI: Thank you.

10 (Whereupon, the document was
11 marked for identification as PS
12 Exhibit 21-X.)

13 BY MR. LANE:

14 Q Did you read CableVision Magazine, or do
15 you still read it, Mr. Mooney?

16 A Yes. Yes.

17 Q Is it a -- describe what it is for us,
18 please.

19 A CableVision Magazine is a trade
20 publication widely read in the cable television
21 industry.

22 Q Now turning to the ad, do you recall
23 seeing ads like this in 1992?

24 A I don't recall this specific ad, nor do I
25 -- I mean there's a lot of advertising in these

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1 magazines. There frequently is advertising from the
2 carriers of distant signals, the satellite carriers.

3 Q Right. Would this seem to be such an ad,
4 sir?

5 A I think it probably is. It is frequently
6 hard to tell. But yes. I think this is probably an
7 Eastern Microwave ad.

8 Q And you see in the middle of the text that
9 it refers in the race for revenues, WWOR's local ad
10 avails make you the winner.

11 A Yes. I see it. I have no idea what that
12 means.

13 Q Do you know whether WWOR and/or Eastern
14 Microwave was making ad avails available to cable
15 operators?

16 A I do not. I believe that Eastern
17 Microwave, at least, would have been prohibited by
18 statute from doing so, with or without the consent of
19 WWOR. Eastern Microwave, in order to fulfill its
20 function is required by statute to be a passive
21 carrier. In the context of this particular law,
22 passive means they can't do anything to the signal
23 except re-transmit it.

24 MR. LANE: I'd like to offer into evidence
25 Program Supplier's Exhibit 22-X, another ad from

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1 CableVision Magazine. This is from March 25, 1991.

2 MR. GERSCH: Are you offering it into
3 evidence or you just want to --

4 MR. LANE: I said I'd like to.

5 (Whereupon, the document was
6 marked for identification as PS
7 Exhibit 22-X.)

8 MR. GERSCH: Mr. Lane, I'd just like to be
9 clear. As I understand it, 21-X has not been moved
10 into evidence. I take it at this time, you are not
11 yet moving Exhibit 22-X into evidence.

12 MR. LANE: That is correct.

13 BY MR. LANE:

14 Q Mr. Mooney, does this look like another
15 CableVision Magazine? That's the logo?

16 A It looks like CableVision Magazine, yes.

17 Q Do you recall seeing an ad similar to the
18 one that is attached to Exhibit 22-X?

19 A No. I'm not sure who this ad is aimed at.

20 Q Well who is CableVision Magazine aimed at?

21 A Well, it's aimed at people who have an
22 interest in the cable television industry. That goes
23 way down to just operators.

24 Q This ad indicates that you can offer your
25 local accounts up to 12 minutes per hour with most of

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1 those minutes available during evening and prime. Do
2 you see that?

3 A Yes.

4 Q Were those -- does that evening and prime,
5 do you think that meant the same evening and prime
6 time hours that you were discussing?

7 A Well I will testify again that I have no
8 idea what this ad means. It is my firm understanding
9 of the statute, and I do know something about this
10 statute, that carriers can not do anything to alter
11 those signals. That means, add from them, delete from
12 them, change them in any way. Nor can cable operators
13 insert into these signals their ads. I don't know
14 what WWOR can do.

15 Quite frankly, I have never heard of the
16 superstations offering local avails. Quite frankly,
17 I don't know that legally they are in a position to do
18 so. I don't know. But I do know about the carriers
19 and the cable operators. I really do not know what
20 this ad is about or what it is aimed at.

21 Q Did you recall any litigation during the
22 1991 or 1992 periods that would have been involved in
23 local ad avails?

24 A No. I do not. That is not to say that
25 there wasn't any, but I just don't recall any. There

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1 is constantly litigation going on in this field under
2 a variety of subjects, some of which would interest us
3 at the trade association, and some of which would not
4 in any direct way.

5 Q And something about ad avails on super
6 stations wouldn't interest you?

7 A Counselor, I had plenty of things to worry
8 about without prospecting for new things to worry
9 about by reading the ads in the trade press. If
10 somebody brought it to my attention there was a
11 problem, then I'd say well it's probably a problem for
12 us. I have no recollection whatsoever of any of this.

13 Q Of anybody bringing this to your
14 attention?

15 A Right. Yes, I do not.

16 Q On page six, you also refer, do you not,
17 to the increases in operator spending doubling from
18 1986 to 1993. Do you see that?

19 A Page six?

20 Q Yes.

21 A Yes.

22 Q That information I take it was obtained
23 from the NCTA television development cited there?

24 A Yes.

25 MR. LANE: I'd like to offer into evidence

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1 23-X, and ask Mr. Mooney if this is a copy of that
2 NCTA cable television development which you refer in
3 your testimony.

4 (Whereupon, the document was
5 marked for identification as PS
6 Exhibit 23-X).

7 BY MR. LANE:

8 Q Is it the same one, Mr. Mooney?

9 A It appears to be, yes.

10 Q Would you look at page 7A of Exhibit 23-X?

11 A Yes.

12 Q Is that where you got the numbers to which
13 you refer on page six of your testimony?

14 A Yes.

15 Q Now it refers, does it not, to in the
16 source for those figures to US Copyright Office data?

17 A Yes, as well as the Paul Kagan --

18 Q As well as other things, right?

19 A Yes.

20 Q Could you tell us what the U.S. Copyright
21 Office data included therein is?

22 A No. I was not personally in charge of
23 assembling these statistics at any time.

24 Q Do you know whether that was royalty data?

25 A I have no idea. I don't know why it

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1 shouldn't have been royalty data. It's a program
2 expenditure.

3 ARBITRATOR WERTHEIM: I'm sorry, I
4 couldn't hear.

5 THE WITNESS: I don't know why it wouldn't
6 include royalty data, because royalties are a form of
7 expenditure for programming, but I don't know the
8 answer to that.

9 BY MR. LANE:

10 Q And you don't know how any of the other
11 figures were derived on this table I take it?

12 A No. I know that they were derived by
13 people professional competent to do it, but it was not
14 the sort of thing that I would supervise myself.

15 Q Do you know what the royalty, how the
16 royalty funds grew during the period 1986 to 1993?

17 A Quite a lot, I think. I'm not sure of
18 that, but I imagine they grew substantially. I do not
19 have any specific knowledge of that in my head.

20 Q Do you know whether they went up or down
21 after 1990 from what they had been in 1989, for
22 example?

23 A I don't know. I do not know what the
24 numbers were in any of those years.

25 Q Do you have any recollection of something

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1 that may have occurred in 1990 that would have
2 decreased the royalty payments by cable systems?

3 A Not off the top of my head. Syndex went
4 into effect in 1990.

5 Q Do you know that that was a pattern effect
6 on the royalty rates?

7 A If it dropped, if it reduced carriage of
8 distant signals, then presumably that would be a
9 negative factor in the total pool. But there would be
10 other things going on that would be positive factors
11 tending to push it up. But I don't have in my head
12 the necessary data to make that comparison.

13 I do believe that if Syndex did result in
14 signals being dropped, that was what the proponents of
15 Syndex wanted, the Hollywood people, the program
16 owners, the broadcasters and so forth.

17 Q You don't know whether there was a
18 separate Syndex rate before and after 1990?

19 A Yes. There was something called the
20 Syndex surcharge, but I don't have it clear in my mind
21 exactly what it was.

22 Q On page seven of your testimony just above
23 the title, you refer to the commercial circumstances
24 under which I take it the super station signals were
25 made available comparatively speaking, increasingly

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1 expensive and inflexible.

2 A Yes.

3 Q Could you describe what you mean there?

4 A Sure. I think the key to that is the
5 words comparatively speaking. Carriage of super
6 stations, the circumstances and manner in which they
7 may be carried, the fees which must be paid as
8 royalties in return for their carriage are all
9 established by law, either by statute or by
10 regulation.

11 Whereas the commercial circumstances under
12 which cable networks are carried are decided by
13 contract, where there typically can be a lot of give
14 and take in terms of how much is charged as a license
15 fee, what avails are made available, the quality of
16 the avails, are they in prime time or are they in less
17 desirable day parts and other kinds of commercial
18 concessions which might be made in either direction.

19 There is a lot of difference between that
20 and something that's set up by the statute and
21 regulation.

22 Q Couldn't the cable operators adjust their
23 royalty rates by re-tiering, for example?

24 A You mean could they -- are you inquiring
25 whether the cable operators could reduce their royalty

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1 rates by putting distant signals on a lower tier,
2 separating them out from the cable network?

3 Q Exactly.

4 A They might. Yes. I suppose they probably
5 would lose royalty rates somewhat. But they also
6 might reduce gross revenues. They might have more
7 people than they'd like go to the lower tier. That's
8 a form of gambling most of them are probably unwilling
9 to undertake.

10 Q But they had that ability?

11 A Are you talking about putting the super
12 stations et al down only on the lower tier?

13 Q They could do anything they want with
14 their tiering, couldn't they? There is no limitation
15 under the --

16 A I just think about this in terms of
17 commercial practicality. I mean most people want the
18 broader tier of basic and do in fact buy the broader
19 tier of basic. If the super stations or any other
20 distant signal are on that tier, the cable operator
21 has to pay royalties on 100 percent of the revenues
22 derived from that tier whether or not the super
23 station or other signal also appears as part of the
24 program offering on a lower tier.

25 You know, you've got to be careful that

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1 you are cutting off your nose to spite your face here
2 if you try to force, if you become so preoccupied with
3 your copyright royalty rates that you try to force
4 them down in a way that is hostile to the interests of
5 your customer.

6 Q But they could take the royalty payments
7 into account if they wanted in deciding what monthly
8 rate.

9 A How to tier?

10 Q Yes. How to tier and what monthly rate to
11 charge for the tiers.

12 A Well, not entirely. Are you talking about
13 today or 1990, 1992?

14 Q 1990 to 1992.

15 A Yes. They could.

16 Q They could also drop distant signals if
17 they felt it was too expensive to carry them, right?

18 A Sure. Yes, they could.

19 Q There is no limit on that in the statute?

20 A There's no legal limit, no. There are
21 commercial disincentives to doing that. If it was all
22 that easy, they would just exceed to the repeal of the
23 compulsory license in its entirety.

24 Q Turning to page eight of your testimony,
25 sir. In the long paragraph towards the bottom of the

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1 page you talk about the backyard dish controversy at
2 the late 1980s. Could you describe what that was?

3 A Until 1979, the Government had a policy
4 which effectively prohibited individuals as
5 individuals from owning satellite receiver dishes. It
6 did so through a requirement that people who
7 maintained satellite receiver dishes be licensed.
8 Then it described the license terms in such a way as
9 made it commercially impracticable for private
10 individuals to use what we now call backyard dishes in
11 a residential setting.

12 Those rules, however, were repealed in
13 1979. As the word spread, particularly in rural
14 communities during the 1980s, that if you went out and
15 bought one of these backyard dishes, you could take
16 down all of the cable and other programming up on the
17 satellite for free, they began to proliferate,
18 particularly in the western and southern states,
19 places where there are substantial rural populations.

20 At some point, the people who own the
21 programming became alarmed that their property was
22 effectively being given away because there was no
23 encryption, no coding of these signals. They were in
24 the clear, and anybody with a backyard dish could just
25 take it and use it.

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1 As most of these people who own the
2 programming or who own the networks that had organized
3 the programming would in the subscription television
4 business, they decided that wasn't a very good idea.
5 So they sought to scramble, it was a term in the
6 industry, the signals, so that they could effectively
7 make a business out of selling the rights to code.

8 There ensued a great political squabble
9 with the people who had the backyard dishes and the
10 people who were selling backyard dishes saying this is
11 unfair to rural people, and we shouldn't have to pay
12 for what comes through the airwaves and so forth.
13 That caused us a lot of problems.

14 Q You refer to the fact that this pitted
15 cable interests against the C-band. Could you just
16 describe what the C-band is?

17 A C-band is the technical description of the
18 backyard -- of the satellite receiver dish technology
19 as it was in use at that time.

20 Q So it pitted the cable interests against
21 the C-band dealers claim that all they wanted was a
22 fair analog to the cable compulsory license. What do
23 you mean?

24 A That was the line of attack which was
25 taken by much of the C-band lobby.

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1 Q Did that lead to section 119?

2 A Is that what it is, section 119?

3 Q Yes.

4 A Of the --

5 Q Satellite carrier royalty provisions.

6 A Are you talking copyright now?

7 Q Yes.

8 A Yes. It did. I had something to do with
9 that.

10 Q Is that what you were just talking about
11 in your testimony here?

12 A No. Not at all. Not even remotely.

13 Q All right.

14 A No. All 119 did, and I think I know what
15 you are referring to, was extend to the backyard dish
16 business the same compulsory license which then was in
17 the copyright act with respect to cable operators
18 using broadcast signals. It was only about broadcast
19 signals.

20 What the dish people wanted was a right to
21 make -- what the dish dealers wanted was a right to
22 have a distribution contract with the cable networks
23 so that if somebody was going to be selling CNN or HBO
24 or whatever to people who own backyard dishes, it
25 could be them, and people who own the dishes would not

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1 have to deal with cable operators.

2 There were not two sides to this. There
3 were three or four or five sides. The people who
4 owned the dishes were not necessarily the same as the
5 people who were selling the dishes. But the people
6 who were selling the dishes were better organized
7 politically than the people who owned them. In any
8 event, used the cause of the people who owned them to
9 advance their commercial claims at Congress. That is
10 what I was talking about.

11 It made a big problem for us, particularly
12 in the Senate with senators from western and southern
13 states who said you are a bunch of bad guys because
14 you are trying to shut down this source of programming
15 which is so valuable to my constituents. We would say
16 no, we're just trying to sell it because it is
17 subscription TV. There the issue was drawn.

18 CHAIRPERSON JIGANTI: Now they were taking
19 broadcast signals?

20 THE WITNESS: They were taking everything.
21 They were taking HBO, broadcast signals, the whole
22 deal. Our position was that if the Congress wanted to
23 -- if equal treatment was the issue, then what the
24 Congress ought to do was build them in the Copyright
25 Act to give them the same access to broadcast signals

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1 as cable has.

2 But that if the issue was whether these
3 dish dealers should have a right to have a contract
4 with HBO, to distribute HBO in the backyard dish
5 market, that would be for Government to intervene in
6 an unprecedented way in these markets.

7 Cable operators didn't have a right, a
8 legal right to have a contract to be an NBC affiliate.
9 You know, the law and the public policy represented by
10 the law recognized and in fact approved of NBC being
11 a broadcast network. That was the business they were
12 in. We didn't see why HBO couldn't be just a cable
13 network. Why it had to be a backyard dish network
14 too. We lost that fight, which was essentially an
15 argument about competition, monopolies, and so forth.

16 But it was the dish people who started it
17 and who popularized it in the Senate, and who created
18 a group of senators there who were very unhappy with
19 us.

20 BY MR. LANE:

21 Q And that, the last answer described what
22 you mean by the equal insistence on equal treatment,
23 page eight of your testimony?

24 A Yes. What I am describing here really is
25 the circumstances under which political controversy

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1 arose that was troubling to us. What was going on at
2 a certain point, at a certain time during the
3 development of this controversy was that people kept
4 throwing back to us that this is just like the
5 compulsory license. What's the matter with you, why
6 can't you agree that someone else should have the same
7 benefit of the walk that you have.

8 We kept saying it is not like the
9 compulsory license. It is different. But you know,
10 in a political forum, you don't always get too far
11 with fine distinctions when you get a lot of angry
12 constituents on the other end.

13 But I could have done without that, having
14 to sit in front of those committees and just have them
15 pound on me all day, with what's the difference
16 rhetoric.

17 Q Would you turn to page 10 of your
18 testimony, please? On the second and third line you
19 refer to teams franchise agreements and a degree of
20 geographic exclusivity. Could you tell us what you
21 mean by that?

22 A Yes. There apparently is a part of the
23 operating assumptions in professional sports that the
24 game, whatever the game happens to be, baseball,
25 basketball, football, whatever, is helped by

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1 attempting to foster a sense of regional identity with
2 individual teams.

3 So they divide the country up into
4 franchise areas and you know, in this area I guess
5 we're part of the Orioles area in this area. I
6 shouldn't say we, I just moved. I'm now part of the
7 Mariners area. Where here you hear Orioles, Orioles,
8 Orioles all the time, you go to the Pacific Northwest
9 and you hear Mariners, Mariners, Mariners. That is
10 how the system works in all of the major sports. It
11 is applied to television. It is frequently applied to
12 television rights, contracts as well.

13 You know, the Orioles not only are the
14 only baseball team around here, but they also are the
15 most frequently appearing team on TV. One of the
16 things that the distant signal thing did was to go
17 around that and allow the development of national
18 affinities to individual teams, like the Braves.

19 Q The geographic exclusivity is also
20 something, is it not, that applies to syndicated
21 series and movies when you license that to a station?

22 A Geographic exclusivity?

23 Q Yes.

24 A Only within the market of a station, which
25 typically are not nearly as broad as sports.

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1 Q But those -- I'm sorry. Were you
2 finished?

3 A Yes.

4 Q But those license agreements would have a
5 geographic exclusive area for the syndicated series
6 and movies. Right?

7 A I believe that the rules prohibit the
8 station from buying exclusivity in an area larger than
9 the one it is licensed to serve.

10 Q Now you refer, in just continuing along
11 that same paragraph, that WTBS could not as a
12 practical matter, would not as a practical matter,
13 have the ability to contract for a national
14 distribution of individual team sports programming?

15 A Right.

16 Q Were you aware that major league baseball
17 had an agreement with WTBS concerning the nationwide
18 distribution of Braves baseball games?

19 A Yes. There was some kind of an
20 arrangement there. I don't know what the details are.

21 Q And were you also aware that WTBS
22 purchased the national rights to an NBA package of
23 games?

24 A No. I am not aware of it.

25 ARBITRATOR WERTHEIM: Could you clarify,

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1 or rather explain a little more why you feel that a
2 distant signal like TBS would not be able to get a
3 contract for national programming? It's all a matter
4 of negotiating, isn't it?

5 THE WITNESS: It goes against the system.

6 ARBITRATOR WERTHEIM: They are doing it
7 now.

8 THE WITNESS: They are doing it on a
9 limited basis. I think that one of the things that --
10 and I'm not -- I don't want to go beyond my expertise
11 in this area. You know, they don't publish all the
12 details of their contracts in the paper or call me up
13 and tell me what is in them.

14 But I think that one of the factors that
15 was very important in whatever the deal was that was
16 done between Turner interests and major league
17 baseball was that it was done within the context of an
18 eckstand (phonetic) compulsory license and an
19 understanding on the part of both sides that the
20 compulsory license was probably going to continue in
21 law, and that Turner would be able to continue to do
22 what he did.

23 I think what he effectively did was bought
24 some kind of political piece with the commissioner and
25 with the other team owners, but I don't know that

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1 anybody has said that he paid the same value that
2 would have arisen from a national rights package, in
3 what one would assume, what a man from Mars will
4 assume to be the conventional sense.

5 Because the way the system works with
6 their individual franchise agreements, a practice
7 which by the way is sanctioned explicitly by statute
8 as well as case law, is that in order to do this on a
9 widespread basis, he would have to give baseball
10 enough money to satisfy all the other owners whose
11 franchise rights within that market were pretty much
12 a part of their relationship with the league.

13 CHAIRPERSON JIGANTI: Mr. Lane, would this
14 be a convenient time to take a break?

15 MR. LANE: Certainly.

16 CHAIRPERSON JIGANTI: We'll take a 10
17 minute break.

18 (Whereupon, from 4:36 p.m. until 4:55 p.m.
19 the proceedings went off the record.)

20 CHAIRPERSON JIGANTI: You may proceed, Mr.
21 Lane.

22 MR. LANE: Thank you.

23 BY MR. LANE:

24 Q Mr. Mooney, you talked about the regional
25 distribution of sports. What do you mean by that?

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1 (No response.)

2 CHAIRPERSON JIGANTI: What page is that,
3 Mr. Lane?

4 MR. LANE: It was in his last answer, Mr.
5 Chairman.

6 CHAIRPERSON JIGANTI: Okay.

7 THE WITNESS: Regional distribution of
8 sports?

9 BY MR. LANE:

10 Q Yes.

11 A I mean the distribution of sporting events
12 via television within a geographic region. I am not
13 trying to be flippant, I don't understand the
14 question.

15 Q Is one of the ways that sports is
16 distributed regionally by regional sports networks?

17 A Yes.

18 MR. LANE: I'd like to introduce as 24-X -
19 - I'm going to hand a copy of the original book to Mr.
20 Mooney, a document entitled "Regional Sports Network
21 Media Guide" March 1992.

22 (Whereupon, the document was
23 marked for identification as PS
24 24-X.)

25 BY MR. LANE:

1 Q This was published by NCTA, was it not,
2 Mr. Mooney?

3 A Yes. Apparently so.

4 Q You were the president and CEO of NCTA in
5 March of 1992. Right?

6 A Yes. I was.

7 Q This purports to be a listing of regional
8 sports networks. Did you have a chance to look
9 through this?

10 A No. I flipped through it. I could see
11 basically what it is, but I don't -- it's a big book.
12 Basically it's mostly information.

13 Q Information about?

14 A Provided by the various sports networks
15 themselves, bound up together in this book for
16 distribution to cable operators.

17 Q And are these regional sports networks
18 with which you are familiar?

19 A Not terribly, no. This is the sort of
20 thing that would have been produced by the industry
21 communications department without a lot of discussion,
22 or indeed probably without any discussion with me.
23 This is the sort of thing that the trade association
24 did as a matter of course, and I'm not familiar with
25 it. I have no recollection of it.

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1 Q Would you turn to the first page of the
2 text there? See, it says that in September of 1987,
3 there are 11.6 million people subscribed to these
4 regional sports networks. By September of 1991, that
5 had grown to 36.6 million people.

6 A Yes.

7 Q I take it these are the same sorts of
8 numbers that you relied on or you have no reason to
9 doubt these numbers, do you?

10 A No.

11 Q When you looked through -- I'm not going
12 to ask you any questions substantively about these,
13 but are these the sports, regional sports networks
14 that you recall of your own knowledge being available
15 generally throughout the country during that period?

16 A Yes. I recognize most of the names as
17 names of sports networks.

18 Q Would you turn back to the NCTA cable
19 television development book that you had that was
20 marked as 23-X?

21 A Yes.

22 Q And if you look at the bottom of the
23 pages, you'll see there are numbers and letters. I
24 would ask you to turn to page 41-C, please.

25 A Okay.

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1 Q That's entitled, "Regional Video
2 Services."

3 A Yes.

4 Q This was compiled at the same time as the
5 other information I take it, on which you relied in
6 your testimony.

7 A This seems to be an April, 1994 book.

8 Q But this is one to which you specifically
9 referred in your testimony as you relying.

10 A Yes. I referred to the book. I didn't
11 refer to that part of it. I referred to the numbers
12 in front about subscriber levels and program basis.

13 Q And if you look at each of the entries in
14 this, let's just sticking with page 41-C, it has an
15 entry, date service began. Do you see that?

16 A Yes.

17 Q And that entry is contained in each of
18 these. Is it not?

19 A It looks as if the format provides for
20 that. I guess it's probably safe to assume that it
21 does, but I don't know that each and every one of them
22 has that in it. Somebody might have left it out.

23 Q Looking through the regional video
24 networks -- again, I don't want to get into the
25 substance, but these are largely comprised of sports

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1 networks. Are they not?

2 A There are a lot of news channels in there
3 too. I see, actually it looks to me, I haven't
4 counted them, but they are in alphabetical order.
5 They are not organized by subject matter, so it's hard
6 to tell, but a lot of them are sports channels, yes.

7 Q And a lot of news channels?

8 A Yes. A lot of news channels too.
9 Particularly in one little clump between pages 45 and
10 --

11 Q And I take it this was again compiled by
12 the NCTA staff?

13 A This book?

14 Q Yes.

15 A I assume it was, yes. I was not there in
16 1994 when this book was published.

17 Q You have no reason to rely on just --

18 A I assume it was. It was probably
19 something that the research department did.

20 MR. LANE: If you could just indulge me
21 for a moment, Mr. Chairman.

22 I have no further questions of Mr. Mooney.

23 CHAIRPERSON JIGANTI: Thank you, Mr. Lane.

24 MR. LANE: Just so that -- in my usual
25 fashion, I would move now for the admission of 21-X,

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1 22-X, 23-X, and 24-X.

2 CHAIRPERSON JIGANTI: All right. Any
3 objections to any of these exhibits?

4 MR. GERSCH: Yes. We object to 21-X and
5 22-X on identical grounds. I think these are quite
6 misleading. I don't think that they are correct
7 response with respect to the grounds that they are
8 misleading.

9 What these are are advertisements for ad
10 space in programs which have been substituted for what
11 WOR regularly carries in its local market as a result
12 of the Syndex rules, so that when WOR is then carried
13 as a distant signal into a distant market, Eastern
14 Microwave, the receiver referred to in the ad which
15 owns the satellite, they strip out the original
16 programming on OR, which is what's subject to the
17 compulsory license. They substitute in their own
18 programming not subject to the compulsory license, and
19 for which Mr. Lane's clients are not seeking credit
20 for. And then they can sell ad space on it.

21 But it's entirely irrelevant to this
22 proceeding because the ads are being sold in the
23 context of the programming which has been stripped out
24 and substituted in.

25 If you look, when you have an opportunity

1 this evening, if you look at Dr. Lemieux's testimony
2 at page 25, he has a sample of WOR's line-up. If you
3 can just see it from here, this is WOR's line-up on a
4 given day. Here in the middle of prime time, and
5 indeed, for almost half the day they have stripped out
6 because of the Syndex rules, much of their
7 programming. That programming that has now been
8 stripped out has been replaced by programming which is
9 not subject to the compulsory license, not relevant to
10 this proceeding.

11 So the fact that there are ads in that
12 substituted programming does not mean anything. That
13 is my basis for objecting on the grounds that it is
14 misleading. The other basis --

15 CHAIRPERSON JIGANTI: Misleading I gather
16 is irrelevant?

17 MR. GERSCH: It is irrelevant and
18 misleading, yes.

19 CHAIRPERSON JIGANTI: It's irrelevant?
20 And you have grounds for you said also sponsorship?

21 MR. GERSCH: Yes. Mr. Mooney said that he
22 had no idea what these ads were and certainly can not
23 be treated as a sponsoring witness.

24 CHAIRPERSON JIGANTI: Does anybody else
25 object?

1 MR. MIDLEN: Devotionals would join that
2 objection.

3 CHAIRPERSON JIGANTI: Mr. Lane, a
4 response?

5 MR. LANE: Yes. Mr. Chairman, and members
6 of the panel, if you look at pages six and seven in
7 Mr. Mooney's testimony, at the bottom of the page he
8 states satellite carriers offering these signals
9 obviously can adjust the transport fees they charged
10 operators, et cetera, et cetera. Then going over to
11 the top of page seven, it says, "Nor are they able to
12 offer incentives such as local add avails" et cetera,
13 et cetera.

14 What is I think a fair reading that
15 testimony is satellite carriers are unable to offer
16 local ad avails.

17 CHAIRPERSON JIGANTI: What? I'm sorry.

18 MR. LANE: Okay? This Exhibit 21 and 22
19 are ads which Mr. Mooney agreed are from Eastern
20 Microwave/WWOR. Eastern Microwave is the satellite
21 carrier that offers WWOR. Quite clearly, they offer
22 local add avails. It didn't say what kind of
23 programs. I completely agree with Mr. Gersch that
24 these are in the blacked-out programs. There is no
25 doubt about that.

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1 But the important point that Mr. Mooney
2 was making is whether they could offer an incentive or
3 not. He said they could not. I am offering these ads
4 to show that indeed they could and they did during the
5 relevant time period.

6 So I believe it is absolutely relevant and
7 right on point, and joins his testimony at pages six
8 and seven.

9 CHAIRPERSON JIGANTI: Concerning
10 sponsorship?

11 MR. LANE: Concerning sponsorship, I think
12 the ads speak for themselves. Mr. Mooney indicated
13 that he was aware of CableVision Magazine. There is
14 no question about the authenticity of this ad. It's
15 a magazine that he indicated was trade press and
16 targeted towards cable operators. I think he can
17 sponsor it. Whether he agrees with what is in it or
18 not is a different question.

19 CHAIRPERSON JIGANTI: So are we talking
20 about two different things here? Are we talking about
21 the use of this as an exhibit for cross examination as
22 opposed to an admission into evidence where it can be
23 considered as substantive evidence?

24 So you are not offering it now merely to
25 impeach Mr. Mooney. You are offering it for the

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1 purpose of showing that there are ad avails at WWOR?

2 MR. LANE: That satellite carriers were
3 able to offer incentives such as local add avails.
4 That is precisely what he states they could not do.
5 I am offering these ads to show that they could do
6 them.

7 I understand why that could be considered
8 impeachment, but I do not want to limit it to that.
9 I think that this could be a substantive matter
10 because he raised it on his testimony. I should be
11 allowed to use these in my briefs saying no, he was
12 wrong on that, if I so choose.

13 But certainly they should be kept in, if
14 for no other reason than for impeachment.

15 CHAIRPERSON JIGANTI: First Mr. Gersch and
16 then you -- I forget.

17 MR. MIDLEN: John Midlen.

18 CHAIRPERSON JIGANTI: Midlen. All right.
19 Mr. Gersch.

20 MR. GERSCH: Yes. First of all, there is
21 no sponsoring witness. Mr. Mooney did not agree that
22 these were produced by Eastern Microwave. He was
23 asked to read the ad, and he read the ad.

24 He testified very clearly both with
25 respect to Exhibit 21 and Exhibit 22 that he had no

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1 idea what these were. So on the sponsorship basis
2 alone, these can not come in, regardless of what Mr.
3 Lane would like to do.

4 If he wants them to come in, he'd need his
5 own witness. I am pleased to see, however, that he
6 does concede that in fact these exhibits do relate to
7 the advertising on programs substituted for that which
8 was stripped out under the Syndex. I think that's
9 another reason why it's irrelevant. But I don't think
10 it can come in, because Mr. Mooney has no idea what
11 these ads are about, and so stated.

12 CHAIRPERSON JIGANTI: All right. Mr.
13 Midlen?

14 MR. MIDLEN: I agree. I would add that I
15 think that based on what Mr. Lane has said, is the
16 purpose for which he wants to use them. That the
17 appropriate way to go would be for these to come in,
18 if in fact they do, by a sponsoring witness during the
19 rebuttal section of the hearing.

20 CHAIRPERSON JIGANTI: We'll take a short
21 recess before I rule on the motion.

22 (Whereupon, from 5:13 p.m. until 5:16 p.m.
23 the proceedings went off the record.)

24 CHAIRPERSON JIGANTI: The motion to admit
25 the exhibits number 22 and 21 will be allowed, that

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1 there is appropriate sponsorship and it is relevant.

2 (Whereupon, the documents
3 previously marked as Exhibits
4 21-X and 22-X were admitted
5 into evidence.)

6 The other exhibits?

7 MR. GERSCH: No objection.

8 CHAIRPERSON JIGANTI: Any objection,
9 counsel?

10 MS. HAND: No.

11 (Whereupon, the documents
12 previously marked as Exhibits
13 23-X and 24-X were admitted
14 into evidence.)

15 CHAIRPERSON JIGANTI: Is there any other
16 cross examination of Mr. Mooney?

17 MS. HAND: No.

18 CHAIRPERSON JIGANTI: Any redirect
19 examination?

20 MR. GERSCH: No.

21 CHAIRPERSON JIGANTI: Okay, Mr. Mooney,
22 thank you very much.

23 ARBITRATOR WERTHEIM: I have one question,
24 Mr. Mooney, very simple I think. Your introductory
25 information tells us you were president and CEO of

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1 NCTA through June of 1993. What have you been doing
2 since then? What are you doing now?

3 THE WITNESS: Oh. I give public police
4 advice to cable companies.

5 ARBITRATOR WERTHEIM: As a consultant?

6 THE WITNESS: As a consultant.

7 ARBITRATOR WERTHEIM: Thank you.

8 THE WITNESS: You're welcome.

9 CHAIRPERSON JIGANTI: It's 5:15. There's
10 no other witnesses today. Your witness tomorrow is?

11 MR. GERSCH: Larry Gerbrandt, Paul Kagan
12 and Associates.

13 CHAIRPERSON JIGANTI: That will conclude
14 the proceedings today.

15 (Whereupon, at 5:20 p.m. the proceedings
16 went off the record.)

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CERTIFICATE

This is to certify that the foregoing transcript in
the matter of: Hearing: Distribution of 1990, 1991
 and 1992 Cable Royalty Funds

Before: Library of Congress
Copyright Arbitration Royalty Panel

Date: December 11, 1995

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Charles Repett